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Supreme Court, U.S.
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Supreme Court of the United States

DORIS PIAMBA CORTES,

Petitioner,

—v.—

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Plaintiffs' Committee Counsel

Marc S. Moller
Counsel of Record
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

Aaron S. Podhurst
Chairman of the Plaintiffs' Committee
PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN
25 West Flagler Street
Miami, Florida 33130

Robert L. Parks
HAGGARD, PARKS & STONE
330 Alhambra Circle
Coral Gables, Florida 33134

—and—

Joel Perwin
Timothy Cook
Kevin Malone
Carlos Velasquez
Ira Leesfield
Stuart Grossman
Jorge Ortiz Brunet

On the Petition

Blanca J. Rodriguez
KREINDLER & KREINDLER

2019

QUESTION PRESENTED FOR REVIEW

Article 25 of the 1929 Warsaw Convention Treaty, which governs international air transportation, provides that the airline shall not avail itself of the treaty provisions which limit its liability when the damage is caused by either the airline's "wilful misconduct" or by such fault that is considered to be its equivalent under forum law. The question presented is:

1 Whether willful misconduct under Article 25 permits proof of "reckless disregard of the consequences" according to an objective prudent person standard, the test typically used in tort law, or requires application of a subjective standard of the flight crew's actual knowledge of the probability of harm, the test typically used in criminal law, an issue as to which the courts of appeals are in conflict.

LIST OF PARTIES TO THE PROCEEDING

In addition to Petitioner-plaintiff Doris Piamba Cortes, the following plaintiffs remain as parties to the multidistrict litigation proceeding In re Air Crash Near Cali, Colombia on December 20, 1995, 96-MDL-1125 (S.D. Fla.), and are bound by the decision below of the Court of Appeals for the Eleventh Circuit vacating summary judgment against defendant American Airlines, Inc., and remanding to the District Court for a determination of liability: Rosalba Marmolejo; Libia A. de Oviedo; Juan Carlos Gomez; Penuca de la Serna Zabala; Diego Fernando Diosa; Jamie Montero; Manuel Rosado; Luis Antonio Castro, Sr. (2 decedents); Gustavo Niño Sua; Florencia Espinosa Vidal; Pedro Alvarez; William Oldham (2 decedents); Maria Garcia; Eduardo Posso (2 decedents); Yaneth Martinez; Sylvia Bullard (2 decedents); Lucia Gallego; Beatriz Elena Tabares Lemos; Oneida Hernandez Castro; Yamileth Lopez; M. Amparo Hurtado; Albert Galvis and Sarah Carlson; Mercedes Lyliana Ramirez; Maria Julisa Mestre; Carmen Lucia Fahey; Raysa Sosa; Carlos H. Concha; Fernando Jimenez; and Franklin LaTorre.

The defendant is American Airlines, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

No. ___

DORIS PIAMBA CORTES,

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AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App. A, 1a-57a)[1] is reported at 177 F.3d 1272 (11th Cir. 1999). It reversed the opinion of the district court granting partial summary judgment against American Airlines in *In re Air Crash Near Cali, Colombia on December 20, 1995*, 985 F.Supp. 1106 (S.D. Fla. 1997). (App. B, 58a - 157a).

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[1] References herein to "App. __" are to the Appendix to this Petition and references to "__a" are to the pages in the Appendix.

JURISDICTION

The judgment of the Court of Appeals (App. C, 158a-159a) was entered on June 15, 1999. By order dated August 18, 1999 (App. D, 160a-161a), the Court of Appeals denied a petition for rehearing *en banc*, treated by that court as a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PROVISIONS OF LAW INVOLVED

This case involves interpretation of Article 25 of the Warsaw Convention Treaty[2] and the impact, if any, that Article 25 of the Montreal Protocol No. 4 has in interpreting Article 25 of the Warsaw Convention and in this case.[3]

WARSAW CONVENTION

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. §40105 (Warsaw Convention).

[3] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rpt. No. 105-20, pp. 21-32 (1998) (Montreal Protocol No. 4).

wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

MONTREAL PROTOCOL NO. 4

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants, or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

STATEMENT OF THE CASE

On December 20, 1995, American Airlines Flight 965, bound for Cali, Colombia from Miami International Airport, crashed into a mountain while attempting to land in Cali. 158 passengers and the eight crew members died, and another four passengers suffered serious injuries. Over 150 lawsuits were filed against American Airlines and consolidated and transferred to the Southern District of Florida. The passenger claims are governed by the Warsaw Convention. Under Article 22, as modified by the 1966 Montreal Agreement, the airline's liability is capped at $75,000 per claim, unless the plaintiffs establish willful

misconduct under Article 25.[4]

Plaintiffs moved for partial summary judgment on the issue of the crew's willful misconduct. The district court applied *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), defining willful misconduct as including acts committed in "reckless disregard of the consequences." The court ruled that reckless disregard under *Butler* meant objective recklessness. App. B, 99a-101a. The court concluded that plaintiffs, in any event, had met both a subjective and an objective recklessness standard as a matter of law and granted partial summary judgment. App. B, 122a.

The Cortes case proceeded to a damages trial and a verdict was entered in favor of the plaintiff. American Airlines appealed to the Court of Appeals on May 6, 1998, seeking, *inter alia*, reversal of the partial summary judgment on liability, arguing that Article 25 required proof of the crew's subjective recklessness, as to which there was a triable issue of fact.

While the appeal was pending in the Eleventh Circuit, and after oral argument, the Senate ratified Montreal Protocol No. 4 ("MP4"), an amendment to the Warsaw Convention. It went into force in the United States on March 4, 1999.[5] The parties were

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[4] The Warsaw Convention uses the spelling "wilful misconduct." The more usual spelling is "willful misconduct," which will be used here except when quoted text requires otherwise.

[5] Montreal Protocol No. 4 and its companion Montreal Protocol No.3 were drafted in 1975 and submitted to the Senate in 1977 for ratification as a unified package. The Senate did not approve ratification because of its unhappiness with the passenger liability cap in Montreal Protocol No. 3. S. Exec. Rpt. No. 105-20 at 6. By 1998, however, most of the world's major airlines had signed inter-carrier agreements prepared in 1995 by the

(continued...)

requested to submit supplemental briefs on the impact, if any, of MP4 in the case, in particular, its amended Article 25. Plaintiffs pointed out to the Court of Appeals that the Executive Branch, in response to questioning from the Senate, interpreted amended Article 25 of MP4, which was lifted from the 1955 Hague Protocol, as incorporating the pre-existing objective reckless disregard standard for willful misconduct under the Warsaw Convention .

The Court of Appeals nonetheless held that amended Article 25 was a clarification of the original treaty's intent to require application of the more onerous subjective reckless disregard standard. In so holding, the Eleventh Circuit put itself in conflict with other circuits, the Executive Branch, the text of Article 25 and its drafting history, the weight of foreign precedents, and the Senate's understanding in consenting to ratification of MP4.

The Court of Appeals first found that its earlier decision in *Butler* did not answer whether the reckless disregard standard for willful misconduct requires proof of the flight crew's actual knowledge of probability of harm from their acts - the subjective recklessness test - or is satisfied by proof of what the crew should have known - the objective recklessness test. It examined other case law and interpreted Second Circuit case law on Article 25 as implicitly requiring the airline's actual knowledge that damage would probably result. App. A, 19a. The court failed to address *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1163 (2d

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[5] (...continued)
International Air Transport Association ("IATA"), by which the airlines waived the Article 22 liability cap, rendering Article 25 irrelevant for future Warsaw Convention cases. *Id.* at 6, 13-15. Accordingly, in 1998 the Executive Branch and the Senate became willing to ratify MP4, which provided much-needed cargo transport reform. *Id.* at 1, 3-4. Montreal Protocol No. 3 was not ratified.

Cir. 1978), *cert. denied*, 440 U.S. 959 (1979), in which the Second Circuit held that Article 25 incorporated an objective prudent person test to assess the knowledge element in recklessness. The court below noted that the District of Columbia Circuit, in *Saba v. Air France*, 78 F.3d 664, 669-70 (D.C. Cir. 1996), also appeared to require proof of subjective recklessness. App. A, 18a, 20a.

Finding the case law to be ambiguous, the Court of Appeals also examined foreign precedents. Relying on cases cited by Lawrence B. Goldhirsch in *The Warsaw Convention Annotated: A Legal Handbook*, 121 (Kluwer 1988), the court noted that according to Goldhirsch, France, Germany, Greece and Korea apply objective tests to the unamended treaty, while Switzerland applies a subjective test. App. A, 21a. The cases Goldhirsch cited were not Warsaw Convention cases, as the court believed, but rather, were Hague Protocol cases, which applied the amended Article 25 that was later carried over to MP4. Despite the weight of foreign precedent favoring the objective test for even amended Article 25, the Court of Appeals dismissed these cases as inconsistent and ambiguous, finding that "this ambiguity supports a conclusion that Montreal Protocol No. 4 clarifies, rather than effects, a substantive change to Article 25." *Id.*

The Court of Appeals next examined Article 25 of MP4. The court admitted that MP4 has no statement of clarifying intent. Its amended Article 25, lifted from the Hague Protocol, which the United States did not ratify, allows a bypass of the treaty's damages cap when the carrier's acts are done "with intent to cause damage or recklessly and with knowledge that damage would probably result." In examining the 1955 Hague Minutes, the court concluded that those drafters were in uniform agreement that amended Article 25 required subjective knowledge for recklessness and that this was a clarification of the original treaty. The court relied on the following: the Hague drafters' intent to

adopt language that corresponded to the common law willful misconduct test; Great Britain's comment that "'knowledge of the probable consequences'" has been a requirement in English law; and the United States' comment that the new language corresponded to "'American Jurisprudence.'" App. A, 22a-23.

The court did not address the unresolved debate at the Hague concerning the susceptibility of "recklessly and with knowledge" to interpretation as either requiring actual knowledge or permitting imputed knowledge. The Court of Appeals also failed to consider that in eliminating the Article 25 reference to forum law and adopting language that tracked the Anglo-Saxon notion of willful misconduct, the Hague drafters had adopted language substantively different from the original French text of Article 25. *See* International Conference on Private Air Law, The Hague, September 1955, ICAO Doc. 7686-LC/140, Vol. 1, Minutes, 162-178 (Hague Minutes) (comments of various delegates explaining the *quid pro quo* relationship between doubling the liability cap in Article 22 and amending Article 25 to both delete reference to forum law for equivalents to "dol" and adopt the Anglo-Saxon definition for willful misconduct, which would now require civil law courts to analyze recklessness, as opposed to "faute lourde" (gross negligence)).

The court also examined the MP4 ratification history. It studied the response of the Departments of State and Transportation to the Senate's concern about the domestic impact of amended Article 25. The Executive agencies opined that amended Article 25 would not modify the United States standard for breaking the liability cap, because it incorporated the objective recklessness standard that already existed in American law. The Executive agencies specifically relied on the Second Circuit's definition of willful misconduct and stated that amended Article 25 also incorporated the objective reckless disregard test of the *Restatement (Second) Torts*, §500. S. Exec. Rpt. 105-20 at 52-53.

The Court of Appeals, however, because it had mistakenly assumed that the Second Circuit required subjective recklessness, could not understand why the Executive Branch had concluded that Article 25, both original and amended, incorporated the Restatement's objective recklessness standard. App. A, 24a-25a, n.9. The court rejected the Executive Branch's incorporation of an objective test as incomprehensible error.

At length, the Court of Appeals looked to the drafting history of the Warsaw Convention. It noted that the British delegate, Sir Alfred Dennis, stated that the French term "dol" in Article 25 would be translated into English as "wilful misconduct," which he said included all that the civil law delegates wanted and which he defined as "cover[ing] not only deliberate acts but careless acts done without regard for the consequences." App. A, at 26a, citing the Warsaw Minutes at 213.[6] The court acknowledged that this "characterization of willful misconduct suggests that the standard may be satisfied without establishing that the carrier knew its actions placed its passengers at risk," but dismissed this possibility, because "the language adopted by the conference does not expressly embody this characterization." App. A, 26a-27. The court never considered that Article 25 allows application of forum law to determine legal equivalents to "dol" and "wilful misconduct." The court dismissed the 1929 drafting history as ambiguous on the knowledge requirement for recklessness and believed that the statements made more than 25 years later at the Hague were, by contrast, "uniform and clear" and required proof of subjective knowledge as original treaty intent. App. A, 27a.

The court concluded that Article 25, as clarified by MP4,

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[6] Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw, Minutes (Robert C. Horner & Didier Legrez trans. 1975) ("Warsaw Minutes").

required subjective knowledge. The court reversed summary judgment, finding a triable issue of fact as to whether the flight crew subjectively knew how significantly off course they were, even though, as the court admitted, the crew knew they were off course in mountainous terrain and knowingly descended, and even though they should have known how far off course they were according to their instruments and other cockpit information. App. A., 32a-36a.

REASONS FOR GRANTING THE PETITION

The federal circuits are in conflict as to whether Article 25 incorporates the tort law's objective recklessness standard or requires proof of criminal subjective recklessness before plaintiffs are entitled to full compensation. The Second and Ninth Circuits have adopted an objective recklessness standard, consistent with tort and contract law. This is also the Executive Branch's interpretation and is the shared view of other signatory states. The District of Columbia and Eleventh Circuits, however, have departed from their own prior case law, the case law of other circuits, the opinion of the Executive Branch, the treaty text and drafting history, and the weight of precedent in foreign courts and have required proof of criminal subjective recklessness.

The opinion below also raises important questions of treaty interpretation. One is the proper weight to be accorded Executive Branch construction of treaties. Another is whether treaty interpretation gained from the drafting history of a subsequent treaty protocol can ever override the reasonable interpretation of a treaty that can be gleaned from the original text and its own negotiations history. These questions arise as to a treaty that has on numerous occasions been the subject of review in this Court, because of the especially difficult task of interpreting a treaty drafted in French, using civil law legal

concepts.[7]

Certiorari review will give this Court the opportunity to refine treaty interpretation methodology, resolve a conflict, correct fundamental error and prevent injustice.

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS AND REFINE TREATY INTERPRETATION METHODOLOGY.

A. There Is Conflict In the Federal Circuits.

There is a conflict in the courts of appeals on what culpability will bypass the treaty's liability cap.[8] The conflict is between whether to apply the tort standard of objective reckless disregard -- which focuses on compensating victims of reckless misconduct where the actor knew or had reason to know of the probability of harm -- or the criminal law standard of subjective reckless disregard, which has the purpose to punish certain acts that are accompanied by the malicious state of mind of actual knowledge of the probability of harm.

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[7] This Court granted certiorari in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *Air France v. Saks*, 470 U.S. 392 (1985); *Chan v. Korean Air Lines, Co., Ltd.*, 490 U.S. 122 (1989); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

[8] Article 25 expressly provides for application of forum law to define "dol," or its English language translation "wilful misconduct" and the legal equivalents to "dol" and "wilful misconduct." *Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985); *Block v. Air France*, 386 F.2d 323, 331 n.21 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). *See also Tseng*, 525 U.S. at 676 (Stevens J., dissenting).

The Second and Ninth Circuits apply the tort objective reckless disregard test. *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Koirala v. Thai Airways, Int'l Ltd.*, 126 F.2d 1205, 1210-11 (9th Cir. 1997). This is consistent with Executive Branch interpretation of Article 25. S. Exec. Rpt. 105-20 at 52-53 (1998). It is also consistent with national tort and contract law. *See, e.g.*, *Prosser and Keaton on Torts*, § 34, 213 (5th ed. 1984); 6A *Corbin On Contracts* § 1472. By contrast, the District of Columbia and the Eleventh Circuits now apply the more onerous criminal subjective recklessness standard, in conflict with the Second and Ninth Circuits, their own prior case law, the Executive Branch's interpretation, and the text and drafting history of Article 25. *See Saba v. Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) (plaintiff must prove that the defendant was subjectively aware of the consequences of his act); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1290 (11th Cir. 1999) (plaintiff must prove that the flight crew actually knew how far off course they were).

The *Saba* and *Cortes* decisions are also irreconcilable with this Court's recognition that the more onerous subjective recklessness standard has typically only applied in criminal cases or quasi-criminal contexts in which punishment is central. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (American civil law calls a person reckless who acts or fails to act in the face of an unjustifiably high risk of harm either known or so obvious it should be known, while the criminal law typically permits a finding of recklessness only when a person disregards a risk of which he is aware).[9]

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[9] *Farmer* concerned the proper test for "deliberate indifference" under the Eighth Amendment prohibition against cruel and unusual punishment. This Court applied the criminal subjective standard because the domain of the Eighth Amendment is unconstitutional punishment, not imposition of liability for the creation of conditions that present risks of harm to society.

(continued...)

The Second Circuit applies objective recklessness for Article 25. *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951), defined willful misconduct as the "intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or ... in such a manner as to imply reckless disregard of the probable consequences...." *Id.* at 124. *Pekelis* held that a request to charge could *not* fail to state that the "employee must either have known that the test was necessary for safety, or his duty to make it *must have been so obvious* that in failing to make it his conduct would be reckless, rather than merely negligent." *Id.* at 125 (emphasis added). This is unmistakably an objective test. *Pekelis* also relied on the 1929 Warsaw Minutes, in particular the definition of willful misconduct given by British delegate Sir Alfred Dennis, who defined it as including deliberate acts and "'acts of carelessness without regard of the consequences.'" *Id.* at 124 n.2 (citing Warsaw Minutes).[10] *See also Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d

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[9] (...continued)
That is the concern of the civil law "when it imposes tort liability on a purely objective basis." *Id.* at 837-38.

[10] It has been recognized that the English translation of the French word "dol" as "wilful misconduct" is an appropriate translation consistent with the intent of the treaty's drafters. *See American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949). According to French law, "dol," also known as "faute dolosive" requires either an intent to harm or an act done with knowledge that harm will result. Jourdain, P., *Droit à Réparation*, Responsabilitè Civile, Fasc. 120-2 (1995). The majority view is that it requires subjective ("in concreto") knowledge. The "faute lourde" which is considered the legal equivalent of, and is thus assimilated to, "dol" under the Roman law maxim "culpa lata dolo aequiparatur" ("grave fault is the equivalent of intentional harm") refers to negligence of an extreme gravity in which the defendant knew or should have known of the risk of damage. *Id.* The defendant's knowledge in "faute lourde" is assessed objectively ("in abstracto"). *Id.*

Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) (affirming *Pekelis*).

In 1965, the decision *Berner v. British Comm. Pacific Airlines, Ltd.*, 346 F.2d 532, 537 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), noted that willful misconduct required some "realization" of probability of harm, adding, however, that "[w]e do not mean to suggest that 'wilful misconduct' is an entirely subjective matter, see Prosser, Torts 189 (3d ed. 1964)...." *Id.* at 538 n.4.

Berner's reference to Prosser is key. It acknowledges that American law treats willful, wanton and reckless acts that are in disregard of obvious risks, as assessed by the objective prudent person standard, as equivalent in legal outcome to intentional acts. *See Prosser and Keaton On Torts*, §34 at 213 (5th ed. 1984).[11] This objective standard for willful and wanton torts has been applied in the tort law of bailments, guest-host statutes, the rule that contributory negligence or assumption of the risk does not bar recovery when the defendant acted wilfully, wantonly or recklessly, and in common carrier cases that void exculpatory or limited liability clauses for willful, wanton and reckless acts. *Id.* at §§34 and 68.[12]

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[11] Prosser and Keaton recognize that the common law's treatment of such aggravated fault as "quasi-intent torts," equivalent in legal outcome to intentional torts, owes its origin to the Roman law. *Id.* at §34, pp. 209-210, n.15, and p. 212 n.50, citing Elliot, "Degrees of Negligence," 6 So.Cal.L.Rev. 81, 143 (1932). Elliot discusses the Roman law concepts of "dolus" (intentional wrongs or fraud) and "culpa lata" (grave fault) and the Roman maxim "culpa lata dolo aequiparatur." Elliot states that this maxim allowed the civil law, and later American common law, to lose concern with the "index of a state of mind" of the actor, and, instead, "examine the external facts and apply objective tests." *Id.* at 99-100; *see also id.* at 116-148 (discussion of American case law).

[12] The American common carrier cases are especially noteworthy because,

(continued...)

The Second Circuit explicitly affirmed the Article 25 objective recklessness standard in *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). There, relying on *Pekelis* and *Berner*, the court said:

> The knowledge required for a finding of willful misconduct is that there must be either actual knowledge that the act, or the failure to act, is necessary in order to avoid the danger, or if there is no actual knowledge, then the probability of harm must be so great that failure to take the required action constitutes recklessness.

Id. at 1163 (citations omitted).[13]

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[12] (...continued)
like Article 25, they vitiate contractual liability caps when the conduct is willful, wanton or reckless, thus following the Roman law maxim "culpa lata dolo aequiparatur." *See Fremont Homes, Inc. v. Elmer*, 974 P.2d 952, 956 (Wy. 1999) (contractual limitation of remedies are void for wilful and wanton misconduct, defined as harm caused intentionally or recklessly); *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 417 (N.Y. 1983) (contractual liability is void in the event of explicit intentional wrongdoing or implicit reckless indifference); *Plant v. Thompson*, 221 S.W.2d 834 (Mo. 1949) (assumption of risk defense void where railroad committed wilful or wanton misconduct, defined under the *Restatement (Second) Torts*, §500, as acts of reckless disregard done "knowing or having reason to know of facts" that create risk of harm); *see also Williston On Contracts* (3d ed.) §1750A (contract cannot exempt liability for future intentional torts, wilful acts or gross negligence); 6A *Corbin On Contracts* §1472 (contracts cannot limit tort liability for harm inflicted wilfully or wantonly).

[13] The Second Circuit's objective standard is in agreement with Prosser and Keaton, §34 at 213, and other prevailing national tort law. *See Restatement (Second) Torts*, §500 (acting in reckless disregard means an act or omission done "knowing or having reason to know" of unreasonable risk of harm); *see also id.* at §282 cmts. e and h (negligence excludes reckless conduct, (continued...)

Objective recklessness has also been applied in the Ninth Circuit. Recently, the Ninth Circuit upheld a jury finding of willful misconduct, and rejected the airline's argument that if the crew was subjectively confused about their "actual position" there could be no willful misconduct. *Koirala v. Thai Airways, Int'l, Ltd.*, 126 F.2d 1205, 1210-11 (9th Cir. 1997). The court held that willful misconduct must be determined "'by reference to the data of practical human experience.'" *Id.* at 1210 (cite omitted).

In 1949, prior to *Saba*, 78 F.3D 664, the District of Columbia Circuit expressly rejected the argument that there must be "well-nigh criminal intent before Article 25(1) had application." *Ulen*, 186 F.2d at 533. The court defined willful misconduct as 1) performance of an act done with knowledge that the act would likely result in harm, 2) or an act performed with "reckless and wanton disregard of its probable consequences, or 3) a "deliberate purpose not to discharge some duty necessary to safety." *Id.*

Ulen's first alternative embodies subjective knowledge of the probable harm (regardless of motive), and alternative three embodies subjective intent to do the wrongful act. These would correspond to the civil law definition of "dol" as intentional wrongs. *See* n. 10 *ante*. Alternative two, the common law's "equivalent" to "dol" stands in contradistinction to alternatives one

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[13] (...continued)
where the actor realizes or should realize danger; such conduct involves culpability which approaches and finally becomes indistinguishable from that which is shown in intended misconduct, and the two conducts are given the same legal effect).

See also Holmes, *Collected Legal Papers* 190 (1920) (the intent in wilful and wanton misconduct is not the intent to cause injury, but to do or not do an act in reckless disregard of the consequences, and under such circumstances that a reasonable man would know or have reason to know of the high probability of harm to another).

and three in that it permits a finding of willful misconduct based on objectively observable recklessness. This is confirmed by *Ulen's* rejection of a "well-nigh criminal intent" and by the principle of nonredundancy. If alternative two also required subjective knowledge of probability of harm, it would be no different from alternative one.

In *KLM Royal Dutch Airlines of Holland v. Tuller*, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961), the court again examined the Warsaw Minutes, agreeing with Sir Alfred Dennis that the best common law translation of "dol," consistent with the shared expectation of the treaty's drafters, is "wilful misconduct," which includes acts accomplished "'with deliberation'" and also "'acts of carelessness without regard of the consequences.'" *Id.* at 779 and n.2, citing Warsaw Minutes. The court affirmed that willful misconduct included acting"in some manner as to imply reckless disregard of the consequences of its performance." *Id.* at 778. The 1996 *Saba* decision is in conflict with this prior caselaw. *Saba*, 78 F.3d at 668.

The Eleventh Circuit initially adopted the objective reckless disregard test of *Tuller*. *Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985). In affirming the jury's verdict of willful misconduct, *Butler* expressly relied on an "objective analysis" of the evidence "rather than on subjective evaluation of the credibility of the crew." *Id.* at 431. The *Cortes* decision is in direct conflict with *Butler*, as well as Second and Ninth Circuit law. It is also in direct conflict with the Executive Branch's interpretation of Article 25.

B. Under the Circumstances, the Eleventh Circuit Should Have Given Controlling Weight to the Executive Branch's Opinion that Article 25 Incorporates Objective Recklessness.

The Departments of State and Transportation interpret Article 25 as incorporating an objective reckless disregard standard. *See* S. Exec. Rpt. 105-20 at 52-53 (1998). The Executive Branch offered its interpretation of Article 25 in response to questions from the Senate Committee on Foreign Relations during ratification of MP4 in 1998.

Article 25 of MP4 was lifted from Article 25 of the 1955 Hague Protocol. The United States did not ratify the Hague Protocol. The amended Article 25 in both MP4 and the Hague Protocol eliminated the reference to forum law and replaced the formula "'dol" and the "faute" which is its equivalent with a description of the conduct that would bypass the liability caps. The substituted language renders Article 22 void when the airline acts "with intent to cause damage or recklessly and with knowledge that damage would probably result." The Senate asked the Departments of State and Transportation what domestic impact MP4 Article 25 would have when compared to the original Article 25. S. Exec. Rpt. 105-20 at 52.

The Executive agencies unequivocally opined that MP4 Article 25 would have no impact domestically, because the amended Article 25 incorporated the pre-existing American judicial definition of "wilful misconduct as reckless disregard," which could be assessed objectively. *Id.* at 52-53. The Executive agencies would not, however, agree to attach a resolution to the ratification of MP4 stating that "no change is intended." S. Exec.

Rpt. 105-20 at 48.[14]

The State Department's response to the Senate's question was:

> U.S. courts have defined willful misconduct as:
>
> ... the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard for the probable consequences of the performance of the act; or
>
> ... the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, would also be willful misconduct. (*Pekelis v. Transcontinental & Western Airlines, Inc.*, 187 F.2d 122 (2d Cir), *cert. denied* [341] U.S. 951 (1951)).
>
> It similarly has been defined as "a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." (*Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955)[*cert. denied*, 350 U.S. 989 (1956)]).
>
> The restatement of Laws, Second, Torts Sec. 500

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[14] In rejecting the suggestion to attach a resolution that "no change is intended" the State Department obviously had in mind that such a resolution would then have to be treated as an amendment to MP4 that would have to be consented to by the other signatory parties. *See New York Indians v. United States*, 170 U.S. 1, 22-23 (1898). The Executive Branch was also acknowledging that MP4 Article 25 could have a substantive impact in some foreign states, although it would have no impact domestically.

> defines "*Reckless disregard of safety," which standard is incorporated into the amended Article 25*, as follows:
>
> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to *do knowing or having reason to know of facts which would lead a reasonable man to realize*, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.
>
> In light of the understanding that the change to Article 25 was intended merely to replace the term "wilful misconduct" with its common law definition, and in light of the above-quoted definitions, *it is our view that the amendment to Article 25 will have no practical effect on the rights of claimants in cases under the Warsaw Convention.*

S. Exec. Rpt. No. 105-20 at 52-53 (emphasis added).

Because the Eleventh Circuit in *Cortes* had misread the Second Circuit case law cited by the Executive agencies and construed it to require subjective knowledge, when in fact *Berner*, 346 F.2d at 537, 538 n.4 and *Tug Ocean Prince*, 584 F.2d at 1163, had rejected that standard, the court below could not understand why the Executive Branch had also incorporated §500 of the *Restatement (Second) Torts*, which unmistakably adopts objective recklessness. The Court of Appeals' solution to this enigma was to accept the State Department's conclusion that amended Article 25 was not a change domestically, but reject the State Department's premise for that conclusion -- that MP4 Article 25 incorporated the objective recklessness standard. The Eleventh Circuit decision is in direct conflict with the Executive Branch's interpretation of Article 25.

In the context in which the Executive Branch interpretation was given, the court below should have given it conclusive weight. This Court applies two standards to determine the weight to be accorded Executive Branch constructions of treaty terms. The normal rule is to accord great weight, though not controlling weight, to such constructions in deference to the constitutional role of the Executive in negotiating, making and enforcing treaties. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 535 n.19 (1987); *O'Connor v. United States*, 479 U.S. 27, 31, 33 (1986); *Sumitomo Shoji American, Inc. v. Avagliano*, 457 U.S. 176, 184 (1982). In certain contexts, however, the Executive's construction of a treaty will be accorded nearly conclusive weight and will be over-ridden only when "extraordinarily strong contrary evidence" exists. *Sumitomo* , 457 U.S. at 184; *see also O'Connor*, 479 U.S. at 33. This heightened standard applies when the Executive Branch construes a treaty that has long been in existence and when the construction is in agreement with a reasonable interpretation of the treaty text and its drafting history, as well as the weight of foreign precedents. *O'Connor*, 479 U.S. at 33; *Sumitomo*, 457 U.S. at 184. That is the case here. There was no "extraordinarily strong contrary evidence" to warrant disregarding the Executive Branch's incorporation of an objective test.

C. The Interpretations of the Executive Branch and the Second and Ninth Circuits Are Consistent with the Treaty Text and Its Drafting History. The Eleventh Circuit Did Not Heed the Treaty Text and Is in Conflict With the Drafting History.[15]

Article 25 directs courts to apply forum law to determine what "faute" (fault) of the carrier is considered the legal equivalent of "dol" for purposes of bypassing the liability cap. This key word "faute" has been mistranslated into the American version of the Warsaw Convention as "default." "Faute" is better defined as: "Fault. Fault is a breach of a pre-existing obligation for which the law orders the reparation.... The question as to whether the actor has committed a fault, with or without the intention to harm, is a matter [of] indifference." *Dahl's Law Dictionary*, French-English, 194 (definition of "Faute") (Paris 1995). Article 25 is concerned, then, with what fault or breach of obligation is treated under forum law as incurring the same legal effect as "dol" (intentional wrong). It is not concerned with what

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[15] The rules of treaty construction relevant here are as follows: A court must start with the text of the treaty, allowing the clear import of the language to control. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 533, 540 (1991). Second, courts are to construe treaties liberally. *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940). When the treaty text is ambiguous or difficult to interpret, courts may examine the post-ratification conduct of the parties, including the weight of precedent in foreign courts. *Air France v. Saks*, 470 U.S. 392, 400 (1985). Ambiguous text also requires examination of the negotiating history. *Id.* This Court has also permitted examination of the drafting history of subsequent treaty protocols to determine whether that history sheds light on the meaning of the unamended text. *Floyd*, 499 U.S. at 548-50. This Court has warned, however, of the less reliable nature of subsequent legislative history, which cannot, in any event, be used to override "a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

mental state ("intention") is considered the equivalent of "dol."

Because Article 25 is a contractual provision giving to victims the right of full compensation in the event of certain "fault" or breach of obligation by the carrier, it is obvious that the appropriate categories of domestic law that courts must look to are tort and contract law. Neither Article 25, nor any other Article of the treaty, implicitly or explicitly, invokes penal law considerations.

The Court of Appeals failed to heed the text of Article 25 and never considered the normally applicable national tort and contract law. The court also failed to consider the treaty as a whole. The treaty was carefully drafted to balance competing interests: it protected the infant aviation industry, but not at the expense of violating public policy by protecting gross misconduct. *See* Warsaw Minutes at 58-59.[16] Thus, while a carrier's liability to the passenger is presumed under Article 17, it is sharply limited under Article 22, and the carrier can be fully exonerated if it proves its nonnegligence under Article 20. Article 17 favors plaintiffs, while Articles 20 and 22 counterbalance that and favor the carrier. For reasons of public policy, Article 25 also balances Article 22 and guarantees full compensation in cases of "dol" and its legal equivalents, as determined by forum law. The Court of Appeals failed to follow the natural reading of Article 25, requiring courts to apply the forum law that would otherwise apply to determine legal equivalents to intentional torts. *See Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217, 224, 231

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[16] (The German delegate stated that the Convention could not deviate from the principle of law that while limited liability may exist for negligence, "in the case of 'faute lourde,' the carrier incurs the same liability as in the case of 'dol'"). *See also* Hague Minutes, ICAO Doc. 7686-LC/140, Vol. I, at 171 (Intervention of Swiss Delegate: any amendment to Article 25 that bypasses the liability cap only in cases of intentional torts and does not also include acts of gross negligence would be contrary to public policy.)

(1996) (Articles 17 and 24 are pass-throughs to domestic damages law that would otherwise apply). By contrast, the Second and Ninth Circuits and the Executive Branch did follow the text of Article 25 and incorporated the national tort law objective reckless disregard test.

The decision below and the *Saba* decision are also in direct conflict with the drafting history of Article 25. That history fails to contain even a suggestion that subjective recklessness is required to be applied, although it does demonstrate that the forum's legal equivalent to "dol" must minimally consist of very gross negligence.

The drafting history reveals that the discussions about Article 25 concerned: 1) whether to substitute "dol" for the less meaningful phrase "intentional illicit action"; 2) whether to find a formula that could incorporate the Roman law maxim "culpa lata dolo aequiparatur" (*see* note 10 *ante*), so that "faute lourde" (gross negligence) could be assimilated to "dol"; and 3) how to accomplish this in a formula that would not require use of civil law terminology. Warsaw Minutes at 59-62, 213-215.

The drafters resolved to find a formula that would allow each country to assimilate "faute lourde" into "dol," in accordance with national public policy, without, however, using the term "faute lourde," so that countries unfamiliar with that term could be spared its difficult translation. *See* Warsaw Minutes at 58-59 (Intervention of German delegate: the Convention cannot deviate from principle that in the case of "faute lourde" the carrier must incur the same liability as in the case of "dol"); 59-60 (Intervention of British delegate: requesting "an expression" that his country could translate, and favoring "wilful misconduct" because "it covers all that which you mean; it covers not only deliberate acts but also careless acts done without regard for the consequences"); 60 (Intervention of Italian delegate: because the

English notion corresponds almost entirely to "dol" and to "faute lourde," the delegates "were in agreement"); 61 (Intervention of French delegate: acknowledging that in France "faute lourde" is included in dol, but fearing that inclusion of that term in the treaty would lead courts unfamiliar with the term to find such fault in all cases); 61 (Intervention of Brazilian delegate acknowledging that the English idea eliminates subjectivity and a "compromise formula is more than necessary because it's a question of cases which will be judged by local courts" and in some courts, like those of Brazil, intentionality of the act is required); 62 (Intervention of Swiss delegate: obtaining the delegates' approval to refer the matter to the drafting committee to "include 'faute lourde' in 'intentional act'" and "find a formula which is satisfactory to the various judicial languages represented here (approval)").

At the Fourth Session, the Drafting Committee President, Mr. Giannini from Italy, was able to report success in arriving at just such a formula: "we succeeded in finding this formula, which has also satisfied our friends from Great Britain, by which we have succeeded in adopting the expression 'faute lourde et de dol,' an expression which is difficult to translate into English." Warsaw Minutes at 211. Sir Alfred Dennis then "noted in the minutes that it [the formula] results from the explanations which were exchanged that we have the expression willful misconduct to translate these words into English, which is very well known and which is very well defined in our law." *Id.* at 213. According to Sir Alfred Dennis, willful misconduct included deliberate acts and careless acts, and as the Brazilian delegate noted, the latter was an elimination of subjectivity. *Id.* at 61.

The Court of Appeals erred in dismissing Sir Alfred Dennis' comments. It acknowledged that his comments supported the construction that the liability cap could be bypassed "without establishing that the carrier knew its actions placed its passengers

at risk." App. A, at 26a-27a. But, the court disregarded this statement because "the language adopted by the conference does not expressly embody this characterization." *Id.*

This reading of the Warsaw Minutes puts the cart before the horse. The text of Article 25 expressly allows national law to determine the equivalent faults to "dol," and the comments of Sir Alfred Dennis explain what that national law is in the common law. Moreover, even assuming, *arguendo*, that the text of Article 25 and the drafting minutes are susceptible to more than one reasonable interpretation on this issue, the Court of Appeals was obliged to apply this Court's rule of treaty construction favoring the reasonable construction which enlarges private rights under a treaty provision. *Bacardi Corp.*, 311 U.S. at 163. Instead, the Court of Appeals erroneously favored the construction which restricted passenger rights under Article 25, a provision added to protect passengers in accordance with public policy and well-established principles of tort and contract law. By contrast, the opinion of the Executive Branch is consistent with the treaty text and history.

D. The Decision below Conflicts with the Weight of Foreign Precedent. The Interpretations of the Executive Branch and the Second and Ninth Circuits Are Consistent With the Weight of Foreign Precedent.

The Court of Appeals misapprehended the post-ratification conduct of other signatories. A decision by the Swiss Supreme Court construing the Hague Protocol and the Warsaw Convention especially highlights that misapprehension. *See* Judgment of November 14, 1967, JT 1968 I 526 (Swiss Sup. Ct.). This case involved international transportation between Argentina and Switzerland. Even though Switzerland had ratified the Hague Protocol, the court applied the unamended treaty, because Argentina had only ratified the Warsaw Convention. The Swiss

court noted that Article 25 of the Hague Protocol was more stringent than the original Article 25, and did not find that the new Article 25 was a clarification of original intent. Instead, the court continued to apply the original Article 25 and treated "faute grave" (serious fault) as the equivalent of "dol" in accordance with Swiss law. The court defined "faute grave" as very serious negligence involving omissions of elementary duties that should have imposed themselves on every reasonable person in the same situation. Id. at 533.[17]

French courts construing the original Article 25 ruled that under French law "faute lourde" (gross negligence) was the domestic equivalent of "dol." *See*, Judgment of April 24, 1952, *Broche-Hennessy v. Air France*, 6 R.F.D.A. 199 (1952) (Trib. Civil Seine), *aff'd*, Judgment of February 25, 1954, 8 R.F.D.A. 45 (1954) (App. Ct. Paris). The subjective test ("culpa in concreto") was not required, as the fault was not the same as a penal violation. Instead, the French court applied an objective test ("in abstracto"). *Id.* at 223. In limiting "faute lourde" to its most serious end of inexcusable recklessness, carelessness, blindness, conscious temerity or stupidity, the *Broche-Hennessy* court relied on the American notion of willful misconduct, citing *American Airlines, Inc. v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949). *Id.*, 6 R.F.D.A. at 223.

Even after France ratified the Hague Protocol, the standard used to assess "recklessly and with knowledge" has been the objective, reasonable person standard. *See*, *e.g.*, Judgment of April 16, 1975, *Ciolkowski v. Air France*, 1976 R.F.D.A. 105, 107 (Sup. Ct. France).

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[17] In the Judgment of July 11, 1972, JT 1974 I 80 (Swiss Sup. Ct.), the same court, in a case now applying amended Article 25, ruled that amended Article 25 required a much stricter fault of subjective recklessness. Switzerland treats amended Article 25 as a substantive amendment that applies prospectively and does not clarify the original intent of Article 25.

Greek courts follow French courts in applying the objective standard even under amended Article 25 of the Hague Protocol. *See* A. Yokaris, "La Jurisprudence de tribunaux grecs sur la Convention de Varsovie," 1977 R.F.D.A. 125, 142 (1977) ("interprétation *in abstracto* ae l'élément psychologique...et non pas *in concreto*"). German courts have also applied an objective test. Judgment of May 10, 1974, 1974 E.T.L. 630 (Bundesgerichtshof).

In Belgium the courts have ruled that the Warsaw Minutes make clear that the delegates wanted to assimilate "faute lourde" to "dol," in accordance with the adage "culpa lata dolo aequiparatur," and that common law countries would, in turn, apply "wilful misconduct," which includes acts deliberately committed and heedless acts committed without looking at the consequences. Judgement of April 17, 1958, *Collet v. Sabena*, 12 R.F.D.A. 411, 414-20 (1958) (Trib. 1st Instance Brussels).

This limited review of European cases suffices to show the following: 1) Article 25 of the Warsaw Convention permitted gross negligence and recklessness, both assessed objectively, to be legal equivalents to dol; 2) Article 25 of the Hague Protocol was a substantive amendment to the Warsaw Convention; and 3) under amended Article 25 the question whether knowledge is to be proved subjectively or objectively appears to vary in accordance with *lex fori*, but the weight of precedent favors an objective test. This is also borne out by the Hague Protocol drafting minutes.

E. The Court of Appeals Misread the Hague Minutes and Impermissibly Allowed That Reading of a Treaty Protocol to Override a Reasonable Interpretation of the Original Text and Drafting History of Article 25.

At the Hague Protocol there was debate that the phrase "recklessly and with knowledge" was susceptible to varying

interpretations as either requiring actual knowledge or permitting imputed knowledge. The issue was never resolved. Hague Minutes, I.C.A.O. Doc. 7686 LC/140, Vol. I, 23rd meeting, pp. 284-5. Various delegates responded to the debate by noting that the question of actual knowledge versus imputed knowledge was a matter to be left to *lex fori*. *Id.* at 285 (Interventions of delegates from France, Israel and United States).[18]

Despite this lack of resolution at the Hague concerning the precise meaning of "recklessly and with knowledge," the Court of Appeals erroneously concluded that the Hague delegates were in uniform agreement that "knowledge" meant subjective knowledge. App. A at 27a. The Court of Appeals disregarded the debate at the 23rd meeting day that established a lack of uniformity. The court also erred in assuming that the word "knowledge" could only mean actual or subjective knowledge, disregarding that it could also permit imputed knowledge.

More importantly, even if the amended Article 25 does require subjective knowledge of probability of harm, as the Supreme Court of Switzerland believes, that is a substantive change to the Warsaw Convention and cannot apply retroactively. *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 268 (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 310 (1994) (there is no presumption of retroactivity of even a "restorative"

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[18] The Court of Appeals correctly noted that during the 17th and 18th meeting days at Hague suggestions were made to replace "recklessly and not caring" with "recklessly and with knowledge." While many delegates favored substituting the word "knowledge," they did not agree on what that word meant in terms of proof. The proof issue was not addressed again until the 23rd meeting day. Hague Minutes at 282-285. The issue was left unresolved. *See also* Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," 80 Harvard L. Rev. 497, 505-06 (1967) (Hague Minutes do not explain what the text "recklessly and with knowledge" was intended to mean).

amendment that purports to correct judicial error to restore a statute's original intent). Application of *Landgraf* and *Rivers* is all the more imperative in interpreting an amendment to Article 25 of the Warsaw Convention, because there is no dispute that the plain language of unamended Article 25 allows application of forum law to define the equivalents of dol, whereas amended Article 25 apparently preempts local law on the substantive conduct that suffices to break the liability cap.

The Eleventh Circuit's misinterpretation of the Hague Protocol as clarifying the intent of the original Article 25 also raises the statutory construction concern expressed in *GTE Sylvania*, 447 U.S. at 118 n.13, that even when it would otherwise be useful, "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." Whatever may be the most reasonable interpretation of amended Article 25, it is clear that under the original text of Article 25 and its drafting history, objective recklessness suffices to bypass the liability cap.

In sum, there is a conflict in the federal circuits concerning the proper interpretation of Article 25. The Eleventh and District of Columbia Circuits apply a criminal subjective recklessness standard, while the Second and Ninth Circuits apply the tort objective recklessness standard. The decision below is in direct conflict with the State Department's construction of Article 25 and with the weight of foreign precedents. This case raises important issues of treaty construction. One is the proper weight to be accorded Executive Branch constructions of treaties. Another is whether judicial interpretation of the drafting history of a subsequent treaty protocol can ever override a reasonable interpretation that can be gleaned from the original treaty text and its own drafting history. There is also a need to correct a clearly erroneous and unjust decision that impacts important private rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 15, 1999

Respectfully submitted,

Plaintiffs' Committee Counsel

Marc S. Moller
Counsel of Record
Kreindler & Kreindler
100 Park Avenue
New York, NY 10017
(212) 687-8181

Aaron S. Podhurst
Chairman of the Plaintiffs' Committee
Podhurst Orseck Josefsberg Eaton Meadow Olin & Perwin
25 West Flagler Street
Miami, Florida 33130

Robert L. Parks
Haggard, Parks & Stone
330 Alhambra Circle
Coral Gables, Florida 33134

-and-

Joel Perwin
Timothy Cook
Kevin Malone
Carlos Velasquez
Ira Leesfield
Stuart Grossman
Jorge Ortiz Brunet

On the Petition:
Blanca I. Rodriguez
Kreindler & Kreindler

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4739
Filed June 15, 1999
D. C. Docket No. 96-727-CIV-SH

DORIS CRISTINA PIAMBA CORTES, Individually and as Personal Representative of the Estate of Maria Constanza Piamba Cortes, deceased,

Plaintiff-Appellee-Cross-Appellant,

—versus—

AMERICAN AIRLINES, INC., a Delaware Corporation,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

Before

BIRCH and DUBINA, *Circuit Judges,*
and MORAN*, *Senior District Judge.*

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* Honorable James B. Moran, Senior U.S. District Judge for the Northern District of Illinois, sitting by designation.

BIRCH, *Circuit Judge*:

In this appeal, we hold as a matter of first impression that Article 25 of the Warsaw Convention, as clarified by Montreal Protocol No. 4, requires a passenger to prove that an air carrier subjectively knew its conduct likely would result in harm to its passengers in order to escape the Convention's limitations on liability. On summary judgment, the district court held that Article 25 measures an air carrier's conduct objectively and concluded as a matter of law that, under either an objective or subjective standard, the passengers' claims for damages were not limited by Article 25's liability cap. For the reasons that follow, we conclude that the district court incorrectly entered summary judgment against the air carrier on this issue and remand for a determination by the finder of fact whether the air carrier's conduct precludes the application of the Convention's liability cap to this case.

In addition, we hold that the district court: (1) properly applied Florida compensatory damages law to this case; (2) properly refused to apply Florida's apportionment of liability statute; and (3) did not abuse its discretion during the damages trial by excluding evidence relating to the facts of the underlying plane crash and prohibiting reference to the legal finding of willful misconduct. We therefore affirm the judgment of the district court with respect to these issues.

I. BACKGROUND

A. Facts

On December 20, 1995, American Airlines Flight 965 ("Flight 965") crashed as the plane attempted to navigate its arrival to the Alfonso Bonilla Aragon airport in Cali, Colombia. The crash killed 151 passengers, including Maria Constanza Piamba Cortes, a domiciliary of Colombia who was returning home after studying in the United States. Appellee-Cross Appellant Doris Cristina Piamba Cortes ("Piamba Cortes"), acting both individually and as the per-

sonal representative of her sister Maria Constanza Piamba Cortes, filed a tort action against Appellant-Cross Appellee American Airlines, Inc. ("American").

The facts leading up to the crash are largely undisputed and have been detailed comprehensively by the district court. *See In re Air Crash Near Cali, Colombia on December 20, 1995*, 985 F. Supp. 1106, 1109-22 (S.D. Fla. 1997). We need not duplicate the district court's detailed factual recitation; for purposes of our discussion, we set forth an abbreviated statement of facts that are relevant in resolving this appeal.

Flight 965 left Miami International Airport on the afternoon of December 20, 1995, bound for Cali. Captain Nicholas Tafuri and First Officer Donnie Ray Williams piloted the Boeing 757, which the parties agree was airworthy and in good mechanical and structural condition. At all material times during the flight, Williams flew the aircraft while Tafuri primarily handled radio communications. The Cali airport is located in a valley approximately forty-three miles long and twelve miles wide. The arrival and approach paths for aircraft landing at the airport are designed to keep planes in an "airway" in the center of the valley and away from the mountainous terrain that surrounds the valley.

American provides special training to its pilots who fly into Central and South America in order to acquaint them with the unusual features of these regions. Among other things, pilots are instructed, in no uncertain terms, not to rely on local air traffic controllers ("ATCs") for information about their location or position in the sky. According to American's training materials, Latin American ATCs will assume when providing clearance that the pilot is on course, the plane is located where the pilot says it is, the pilot knows where the mountains are, and the pilot will refuse a clearance that will take the plane into a mountain. Because these assumptions may be incorrect, the ATCs will clear pilots to descend below minimum safe altitudes in mountainous areas.

American also instructs its pilots that they must continually verify their exact location by every means available; if they

are unable to locate and cross-check their position or are otherwise unsure of where they are, they must suspend any descent of the airplane until their position is verified and the safe minimum altitude is determined. Furthermore, American teaches its pilots to insist on the complete published or assigned flight plan for the plane's approach to the airport unless the pilot is sure of the plane's location and the terrain below. If the plane is operating on an unpublished route, American's training materials and FAA regulations provide that "the pilot, when an approach clearance is received, shall maintain the last altitude assigned until the aircraft is established on a segment of the published route." *Id.* at 1129-30.

The flight plan assigned to Flight 965 called for the plane to follow a specified route during its arrival and approach to Cali. The arrival phase typically is conducted in accordance with a specified route that consists of a series of waypoints that define the path to the landing strip. In this case, the waypoints were marked by radio beacons known as "navaids," which emit radio waves that can be tuned in from the cockpit and allow the pilot to determine the compass direction to, and in some instances the distance to, the waypoint. The waypoints also may help a pilot establish the plane's position in the sky, as well as its distance to a certain point.

Based on data recovered from Flight 965's digital flight data recorder and the statements of Tafuri and Williams on the plane's cockpit voice recorder,[1] the parties have reconstructed the following events that led to the crash.

Flight 965 approached Cali at night. Originally, Flight 965 was assigned a published arrival path to Cali that called for

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[1] The summary judgment record contains two transcriptions of the cockpit voice recorder. One version is based upon the work of an investigatory group of the National Transportation Safety Board. The second was prepared by an expert retained by American, and contains interpretations of the crew's statements at critical points during Flight 965's approach that are more favorable to American. When making its factual findings, the district court relied exclusively on the second transcription prepared by American's expert. We therefore will do the same.

the plane to fly over the "Tulua" waypoint, located approximately thirty-four miles northeast of the airport, proceed to the "D21 CLO" waypoint, and then fly over the "Rozo" waypoint, which is located approximately three miles north of the airport. From there, the arrival path called for the plane to continue south to the "Cali" waypoint, located nine miles south of the airport, and, after executing a 180-degree turn, return north to the airport and land.

When Flight 965 was approximately fifty-four miles north of the airport, the ATC stationed in Cali cleared the plane to the Cali waypoint and instructed the pilots to descend and maintain 15,000 feet and to "report uh, Tulua." *Id.* at 1117. Moments later, however, the Cali ATC offered the pilots the option of landing straight onto the runway without having to turn the plane around at the Cali waypoint. The pilots accepted the offer, and thus accepted a published flight route that began at the Tulua waypoint, proceeded to the Rozo waypoint, and ended at the runway.

After accepting the offer, the cockpit voice recorder suggests that Williams erroneously believed the flight route began at the Rozo waypoint instead of the Tulua waypoint. Tafuri told Williams that the flight route began at the Tulua waypoint, but then asked the ATC for permission to go "direct to Rozo and then do the Rozo arrival," a request that set in motion a chain of events that culminated in the crash. *Id.* at 1118. The ATC responded by saying, "Affirmative," but added instructions to "take the Rozo One" approach and to "report Tulua at twenty-one miles and five thousand feet." *Id.* at 1119.[2]

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[2] The parties disagreed about what Tafuri and Williams would have understood by the term "direct." According to Piamba Cortes and the passengers' representatives, Latin American ATCs use "direct" to mean "direct along the published route," and that Tafuri and Williams received training as to this fact. The district court concluded, however, that evidence adduced by American created a question of fact whether Tafuri and Williams understood the ATC's use of the word "direct" to mean "direct along the published route" or "direct to the specified waypoint." *See In re Air Crash Near Cali*, 985 F. Supp. at 1117 & n.8, 1119.

After this exchange, one of the pilots sought to program the flight management computer ("FMC") to fly automatically to the Rozo waypoint by typing the letter "R" into the FMC's keypad. A total of twelve waypoints appeared on the FMC screen, the first of which was for the "Romeo" waypoint, located approximately 132 miles to the northeast of the plane. Although the pilots were required to verify that the chosen waypoint was actually Rozo, the pilot did not verify the Rozo waypoint and instead selected the Romeo waypoint. The FMC immediately began to fly the plane in the direction of the Romeo waypoint, sending the plane on a prolonged, and pronounced, turn to the left, toward the east and toward the mountains.

At the time the plane began turning, it was descending past an altitude of 16,880 feet and was flying adjacent to, or slightly to the southwest of, the Tulua waypoint. During the turn east, Tafuri told Williams that he wished the plane to fly to the Tulua waypoint, but instead of dialing the proper frequency for the Tulua waypoint (117.7) into his electronic horizon situation indicator ("EHSI"), Tafuri unwittingly dialed 116.7, the frequency for a different waypoint located 160 miles to the east of the valley. Consequently, the course deviation indicator ("D-bar") function of his EHSI indicated that the Tulua waypoint was located to the left of the plane. Tafuri, however, instructed Williams to turn back toward the right, which sent the plane in a westerly direction and back toward the valley. At that time, the plane was south of the Tulua waypoint, well to the east of the valley, and east of the radials that define the flight route to the Rozo waypoint. The plane also had continued its descent, dropping more than 5,000 feet since the "R" had been entered into the FMC.

Less than one minute later, Tafuri dialed 117.7, the correct frequency for the Tulua waypoint, into his EHSI. Because the plane already had passed the Tulua waypoint, this caused the D-bar indicator to shift on the EHSI screen. Tafari instructed Williams to fly to the Cali waypoint, although he also confirmed with the ATC that the flight plan called for the plane

to fly first to the Tulua waypoint and then to the Rozo waypoint. Tafuri commented to Williams that he was having difficulty locating the Tulua waypoint, so Williams suggested that they intersect with the flight route and fly directly to the Rozo waypoint.

At that time, the plane had descended to 10,000 feet and was still heading west. When the plane dropped to 8,480 feet, the plane's ground proximity warning system sounded, directing the pilot to pull up. Williams attempted to climb, but the plane's ability to climb rapidly was hampered by the fact that Tafuri and Williams failed to pull back the speed brakes, which had been deployed several minutes earlier. Approximately thirty seconds later the plane crashed near the summit of El Deluvio, a peak located approximately twenty-four miles northeast of the airport and approximately ten miles east of the airway.

B. Procedural History

After Piamba Cortes filed suit in Florida state court, American removed the case to federal court where it was consolidated for multidistrict pretrial proceedings with almost 160 other passenger lawsuits. Piamba Cortes, through the Plaintiffs' Steering Committee, filed a motion for partial summary judgment on the issue of American's liability. After a four-day hearing on the motion, the district court granted the motion.

In a 118-page order granting the plaintiffs' motions for summary judgment, the district court concluded that all the passengers' suits against American fell under the terms of the Warsaw Convention. According to the language in effect at the time the district court entered its order, the Convention limited an air carrier's liability except in cases of "willful misconduct." The district court concluded that Eleventh Circuit law allows a passenger to establish willful misconduct in three ways, one of which is defined as "reckless disregard of the consequences." *In re Crash Near Cali*, 985 F. Supp. at 1127. Noting that all the passengers' representatives pro-

ceeded under a reckless disregard theory, the district court further concluded that reckless disregard contemplates a "rigorous objective inquiry" that is satisfied "by showing that the defendant's conduct amounted to an extreme deviation from the standard of care under circumstances where the danger of likely harm was plain and obvious," even if the defendant did not subjectively realize that its conduct placed its passengers at significant risk of harm. *Id.* at 1128, 29. Upon reviewing the evidence, the district court held that no reasonable jury could find that Tafuri and Williams' conduct—in particular, the decision to continue descending at night in mountainous terrain when the circumstances made clear that the plane had strayed dramatically from the published arrival route—amounted to anything less than willful misconduct. *Id.* at 1138. The district court reached this conclusion by applying its objective analysis for reckless disregard, although the court held in the alternative that, even if reckless disregard contemplates a subjective test, the evidence compelled a conclusion that Tafuri and Williams engaged in willful misconduct.

After entering summary judgment in Piamba Cortes' favor on the issue of liability, the district court conducted a trial on the issue of damages. Although Piamba Cortes' sister was a domiciliary of Colombia, the district court's conflict-of-laws analysis concluded that Florida compensatory damages law determined the elements of compensatory damages awarded to Piamba Cortes. In addition, the district court held that, under the Convention, American is liable for all compensatory damages and thus Florida law requiring the apportionment of liability did not apply. Finally, the district court ruled that, during the damages trial, Piamba Cortes could not introduce the factual circumstances of the crash and could not mention the court's finding that the conduct of Flight 965's pilots constituted willful misconduct.

American appeals three issues, arguing that: (1) "willful misconduct" requires a subjective rather than an objective test, and the evidence creates a question of fact for the jury

under this test; (2) conflict-of-laws principles warrant the application of the compensatory damages scheme used by the decedent's domicile, which in this case is Colombia; and (3) the Convention operates as a "pass-through" on the issue of damages, and thus the district court should have applied Florida's apportionment statute. Piamba Cortes cross-appeals, arguing that, during the trial on damages, she should have been able to introduce the facts of the crash and inform the jury that Flight 965's pilots had engaged in willful misconduct as a matter of law. We consider each argument in turn.

II. WARSAW CONVENTION

American raises two distinct arguments related to the Warsaw Convention. First, American argues that the district court erroneously construed "willful misconduct" under the Convention to create an objective rather than a subjective test. Second, American argues that, if the subjective test is applied, a question of fact exists whether the conduct of Flight 965's pilots constitutes willful misconduct, and therefore the entry of summary judgment on the issue of liability was inappropriate.

The first issue requires us to determine whether the district court properly construed the terms of a treaty, which is a question of law that we review *de novo See Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994).

A. Background of the Warsaw Convention

The Warsaw Convention is the commonly used name for the Convention for the Unification of Certain Rules Relating to International Transportation by Air, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* note following 49 U.S.C.App. § 1502 (1988) (hereinafter "Warsaw Convention"), which entered into force for the United States on October 29, 1934. *See Butler v. Aeromexico*, 774 F.2d 429, 430 n.1 (11th Cir. 1985). The Convention is the product of two international

conferences, the first held in Paris in 1925 and the second in Warsaw in 1929. *See generally Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467-69 (11th Cir. 1989) (providing overview of the history, policies, and goals of the Warsaw Convention), *rev'd on other grounds*, 499 U.S. 530, 111 S. Ct. 1489, 113 L.Ed.2d 569 (1991). The Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention art. 1(1).

Under Article 17 of the Convention, air carriers are "liable for damage sustained in the event of the death or wounding of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Warsaw Convention art. 17. The Convention thus "established a presumption that air carriers are liable for damage sustained by passengers as a result of the carrier's negligent conduct." *Floyd*, 872 F.2d at 1467. In exchange for this presumption of liability, the drafters included a limitation on the amount of damages a passenger could recover from the carrier: 125,000 gold francs, or approximately $8,300. See Warsaw Convention art. 22; *see also Floyd*, 872 F.2d at 1467.

As a companion provision to the liability cap contained in Article 22, the drafters adopted a safety valve by which passengers could escape the liability cap if they established that the air carrier's conduct that caused their injuries constituted "wilful misconduct."[2] Warsaw Convention art. 25(1). Specifically, Article 25(1) provided that:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct.

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[2] This term is more commonly spelled today as "willful misconduct." We use the modern spelling in this opinion except for direct quotations.

Id. Consequently, in order to obtain any compensatory damages over $8,300 under the original version of the Convention, a passenger had to establish that his or her damages were the result of the air carrier's willful misconduct.

The $8,300 liability cap created by Article 22 proved to be a source of great dissatisfaction, particularly in the United States. *See Floyd*, 872 F.2d at 1468-69. In 1955, a conference similar to the 1929 conference in Warsaw convened at the Hague, during which delegates drafted what is known as the Hague Protocol. See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter "Hague Protocol"), *reprinted in* Lawrence B. Goldhirsch, The Warsaw Convention Annotated 265-74 (1988) (hereinafter "Goldhirsch"). The Hague Protocol proposed to double the liability limit contained in Article 22 to 250,000 gold francs, or approximately $16,600. See Hague Protocol art. XI, *reprinted in* Goldhirsch at 268; *see also Floyd*, 872 F.2d at 1468. In addition, delegates proposed deleting the term "willfull misconduct" from Article 25 and replacing it with language that would allow a passenger to escape Article 22's liability cap only if "it is proved that the damage resulted from an act or omission . . . done with intent to cause damage or recklessly and with knowledge that damage would probably result." Hague Protocol art. XIII, *reprinted in* Goldhirsch at 269. The Senate, however, refused to ratify, and the President did not adhere to, the Hague Protocol.

The rejection of the Hague Protocol by the United States prompted the execution of the Montreal Agreement of 1966, in which air carriers agreed to enter into private contractual agreements with all passengers (created by the purchase of a ticket) to raise the liability limit to $75,000 for all international flights originating, terminating, or having a connecting point in the United States.[3] Agreement CAB 18900, *approved*

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[3] Article 22(1) of the Warsaw Convention provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." Warsaw Convention Art. 22(1). Pursuant to the Montreal

by Civil Aeronautics Board Order No. E-28680, May 13, 1966, 31 Fed. Reg. 7302 (1966).

The execution of the Montreal Agreement set the stage for a concerted effort to update the terms of the Convention to reflect modem legal and technological standards. At another conference in Guatemala City in 1971, delegates proposed raising the liability cap to approximately $136,000. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 ("the Guatemala City Protocol"), *reprinted in* Goldhirsch at 319-29. In 1975, delegates met once again in Montreal, Canada, and adopted a series of four protocols, known collectively as the Montreal Protocols. *See* Goldhirsch at 331-62 (reprinting the four Montreal Protocols). During the twenty years following the 1975 Montreal conference, the United States declined to ratify either the Guatemala City Protocol or the Montreal Protocols.

On September 28, 1998, the Senate ratified the fourth of the Montreal Protocols ("Montreal Protocol No. 4") independently of the Guatemala City Protocol and the three other Montreal Protocols, and the President signed the instrument of ratification on November 5, 1998. *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, — U.S. —, —, 119 S. Ct. 662, 674 & n.14 (1999). Montreal Protocol No. 4 replaces the term "willful misconduct" in Article 25 with the same language as contained in the Hague Protocol:

> [t]he limits of liability specified in . . . Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Agreement, the air carriers amended their contracts of carriage, applicable to the United States, by filing tariffs raising the limit of liability for passenger injury and death to $75,000. *See* 14 C.F.R. § 203.4 (1998).

Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 ("Montreal Protocol No. 4") art. IX, *reprinted in* Goldhirsch at 358.[4]

B. Application of Montreal Protocol No. 4 to This Case

During the district court proceedings, Piamba Cortes' ability to recover more than $75,000 hinged upon establishing that the pilots of Flight 965 engaged in willful misconduct under Article 25, thus allowing Piamba Cortes to avoid the limitations on liability contained in Article 22. While this case was on appeal, however, the United States' adherence to Montreal Protocol No. 4 changed the language used in

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[4] In 1994, the International Air Transport Association ("IATA") launched an initiative for its member airlines to waive, by private contractual agreement, the liability cap contained in Article 22 of the Convention. *See* Thomas J. Whalen, Update on the IATA Intercarrier Agreement, 13 Air & Space Law. 1, 18 (1998). The IATA drafted what is known as the IATA Intercarrier Agreement on Passenger Liability, which imposes strict liability upon carriers for damages of up to approximately $130,000, but allows a carrier to exculpate itself from liability over this amount if it proves that "[the carrier and its agents] have taken all necessary measures to avoid the damage or that it was impossible for [the carrier and its agents] . . . to take such measures." *See id.* at 18-19; *see also* 144 Cong. Rec. S11059-02, S11060 (Sept. 28, 1998) (statement of Lee S. Kreindler). Under the IATA's system, the willful misconduct exception of Article 25—or, more recently, the exception as clarified by Montreal Protocol No. 4—is rendered irrelevant, because the carrier has contractually agreed to pay all a passenger's damages over $130,000 unless the carrier can show it took all necessary measures to avoid the damages. *See* S. Exec. Rep. No. 105-20, at 6, 13 (1998). The Department of Transportation approved the IATA Intercarrier Agreement on November 12, 1996. *See* D.O.T. Order 96-11-6, 1996 WL 656334, at *3 (D.O.T. Nov. 12, 1996). As of April 5, 1998, fifty-one domestic and foreign air carriers had adhered to the IATA Intercarrier Agreement, including American. *See* S. Exec. Rep. No. 105-20, at 57. The parties have not argued that the IATA Intercarrier Agreement applies retroactively to this case, and we therefore do not consider the issue.

Article 25 to measure such conduct. Montreal Protocol No. 4 specifies that it will enter into force in a ratifying jurisdiction ninety days after the instrument of ratification is deposited with the Polish government. See S. Exec. Rep. 105-20, at 4 (1998). As a result, the Protocol entered into force in the United States on March 4, 1999. *See Tsui Yuan Tsen*, — U.S. at — n.14, 119 S. Ct. at 674 n.14. We therefore must determine whether the new language contained in Montreal Protocol No. 4 applies to this case. We first look to see whether the amendment effects a substantive change in the legal standard or merely clarifies the prior law. As we explain, if the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law.

At first, it seems intuitively appealing to conclude that, because the new language significantly alters the text of the original Convention, the original Convention's language may be presumed to have meant the opposite. For example, Montreal Protocol No. 4's language includes an express requirement that the air carrier must know that damage probably will result from its conduct, so one might conclude that such a requirement was omitted from the original Convention. This intuition runs contrary to our precedent, however, which holds that an amendment containing new language may be intended "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment . . . does not necessarily indicate that the unamended statute meant the opposite" of the language contained in the amendment. *United States v. Sepulveda*, 115 F.3d 882, 885 n.5 (11th Cir. 1997).

Moreover, concerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law. *See Beverly Community Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997), *cert. denied*, — U.S. —, 119 S. Ct. 334,142 L.Ed.2d

276 (1998); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887-890 (1st Cir. 1992); *Boddie v. American Broadcasting Cos.*, 881 F.2d 2675 269 (6th Cir. 1989); *cf. Tsui Yuan Tseng*, — U.S. at —, 119 S. Ct. at 667-68 (concluding that a provision in Montreal Protocol No. 4 limiting recovery for bodily injuries clarifies, but does not change, prior law under the Convention). In effect, the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law. *See Liquilux*, 979 F.2d at 890 ("Clarification, effective *ab initio*, is a well recognized principle.").

Several factors are relevant when determining if an amendment clarifies, rather than effects a substantive change to, prior law. A significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law. *See Liquilux*, 979 F.2d at 890. Second, courts may rely upon a declaration by the enacting body that its intent is to clarify the prior enactment. *See id.* Courts should examine such declarations carefully, however, especially if the declarations are found in the amendment's legislative history rather than the text of the amendment itself. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13, 100 S. Ct. 2051, 2061 n.13, 64 L.Ed.2d 766 (1980). As a general rule, "[a] mere statement in a conference report of [subsequent] legislation as to what the Committee believes an earlier statute meant is obviously less weighty" than a statement in the amendment itself. *Id.; see also Pennsylvania Med. Soc'y v. Snider*, 29 F.3d 886, 900 (3d Cir. 1994) (attributing no value to a House committee report stating that an amendment clarifies prior law when the statement is inconsistent with a logical reading of the earlier version of the statute and with the legislative history of the earlier statute). Declarations in the subsequent legislative history nonetheless may be relevant to this analysis, especially if the legislative

history is consistent with a reasonable interpretation of the prior enactment and its legislative history. *See Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 293-94 (5th Cir. 1997) ("Although a committee report written with regard to a subsequent enactment is not legislative history with regard to a previously enacted statute, it is entitled to some consideration as a secondarily authoritative expression of expert opinion.") (quoting *Bobsee Corp. v. United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969)); *SEC v. Clark*, 915 F.2d 439, 451-52 (9th Cir. 1990) ("While a statement concerning an earlier statute by members of a subsequent legislature is of course not conclusive evidence of the meaning of the earlier statute, the later interpretation may be accorded some deference where the subsequent legislative commentary accompanies the enactment of an amendment to the earlier law."); *cf. GTE Sylvania*, 447 U.S. at 118 n.13, 100 S. Ct. at 2061 n.13 (noting that such history is "sometimes considered relevant," but "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment").

1. Ambiguities and Conflicting Interpretations of Article 25

We first examine whether a conflict or ambiguity existed with respect to the application of Article 25 as originally enacted. The English translation of Article 25 allowed a passenger to avoid the liability cap if he could establish that the injury resulted from willful misconduct by the air carrier. We announced the Eleventh Circuit's test for willful misconduct in *Butler*. 774 F.2d at 430. Adopting a test used by the District of Columbia Circuit, we held that willful misconduct "mean[s] 'the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage' or 'reckless disregard of the consequences' or 'a deliberate purpose not to discharge some duty necessary to

safety.' " *Id.* (quoting *Koninklijke Luchtvaart Maatschappij N.V. v. Tuller*, 292 F.2d 775, 778-79 (D.C. Cir. 1961)).

Butler thus identifies three alternative ways to prove willful misconduct: (1) intentional performance of an act knowing that the act likely would result in injury or damage; (2) an action taken with "reckless disregard" of the consequences; or (3) a deliberate failure to discharge a duty necessary to safety. 774 F.2d at 430. The first prong questions whether the carrier subjectively realized at the time of the relevant action that this action was likely to result in injury or damage to its passengers. The second prong is less precise, requiring that an air carrier "recklessly disregarded" the consequences of its acts. Without offering further explanation of the meaning of the term "reckless disregard,"[5] we held that the facts in *Butler* established that the defendant's pilot had recklessly disregarded the likelihood that his conduct would cause a plane crash and therefore had engaged in willful misconduct. *Id.* at 431-32.

In other Eleventh Circuit precedent, the term of art "reckless disregard" has different meanings depending on the context in which it is used. For example, when examining whether an individual willfully failed to pay withholding taxes, reckless disregard requires "something less than actual knowledge" of a risk. *Malloy v. United States*, 17 F.3d 329, 332 (11th Cir. 1994). In libel law, on the other hand, reckless disregard requires a showing that a defendant in fact knew that a published statement might be false. *See Meisler*

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[5] The district court in *Butler*, in addition to finding that the air carrier engaged in willful misconduct as defined in Article 25, also pointed out "as a second string to its bow . . . that if it were needful to resort to local law, the Alabama concept for 'wantonness' was substantially equivalent to the Convention's primary standard" for willful misconduct. *Butler*, 774 F.2d at 430-31. We hypothesized in *dicta* that, to the extent that Alabama's test for wantonness differed from the Convention's test for willful misconduct, the air carrier suffered no harm such that the case must be reversed. *Id.* at 431. We did not) as American suggests, hold that the test for willful misconduct under Article 25 is equivalent to the Alabama standard for wantonness.

v. Gannett Co., Inc., 12 F.3d 1026, 1030 (11th Cir. 1994) (" 'Reckless disregard,' for purposes of proving actual malice, is shown if the defendant entertained serious doubts as to the truth of his publication.) (internal quotation marks omitted). We therefore find little guidance under Butler and other Eleventh Circuit precedent as to the precise meaning of reckless disregard in the context of cases filed under the Convention.

A similar lack of clarity exists in our sister circuits when applying the term "willful misconduct" in Warsaw Convention cases. Despite the fact that all circuits to address the issue have used the term "reckless disregard" when applying Article 25, *see, e.g., Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 93 (2d Cir. 1998) (carrier must have acted either (1) with knowledge that its actions would result in injury or death, or (2) in conscious or reckless disregard of the fact that death or injury would be the probable consequences of its actions), *cert. denied*, — U.S. —, 119 S. Ct. 1033 (1999); *Koirala v. Thai Airways Int'l, Ltd.*, 126 F.2d 1205, 1209-10 (9th Cir. 1997) (air carrier must intentionally perform an act, or fail to perform an act, with knowledge that it probably will result in injury or harm, or intentionally performed an act in some manner as to imply a reckless disregard of the consequences of its performance); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 666 (D.C. Cir. 1996) (same); *In re Air Crash Disaster*, 86 F.3d 498, 544 (6th Cir. 1996) (same), the courts have employed a "know-it-when-we-see-it" approach rather than articulating precisely what is meant by reckless disregard. *See, e.g., Saba*, 78 F.3d at 667 (stating that, although the D.C. Circuit clearly has equated willful misconduct with reckless disregard, the court "never ha[s] been very clear as to what we meant by reckless disregard"); *see also* Perry S. Bechky, Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation, 60 J. Air L. & Com. 455, 501-02 (1995) (U.S. courts have "grappled" with question whether reckless disregard envisions a subjective or objective

test, but have "generally regarded 'willful misconduct' as equivalent to recklessness or gross negligence").

Notwithstanding the fact that courts have avoided precise definitions of reckless disregard in Warsaw Convention cases, it is possible to make inferences regarding the analysis the courts employed in their decisions. For example, in 1961 the District of Columbia Circuit upheld multiple findings of willful misconduct based on a theory of reckless disregard without finding that the air carrier or its pilots subjectively knew that their conduct likely would harm passengers. *See Tuller*, 292 F.2d at 779-80.[6] The Second Circuit, on the other hand, admonished a district court for "concluding that the Second Circuit does not require knowledge that damage would probably result" when assessing willful misconduct under a theory of reckless disregard. *See Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 536 (2d Cir. 1965). The *Berner* court further observed that "[t]here must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." *Id.* at 537 (quoting *Grey v. American Airlines, Inc.*, 227 F.2d 282~285 (2d Cir. 1955)). Later Second Circuit opinions continue to require a showing that the carrier knew that its actions placed its passengers at risk. *See, e.g., Republic Nat. Bank v. Eastern Airlines, Inc.*, 815 F.2d 232, 239 (2d Cir. 1987) ("factors must be established indicating that such a loss is likely to occur and that defendant was aware of the probability").

The opinion that has attracted the most recent attention in this area is *Saba*, in which the District of Columbia Circuit endeavored to clarify the ambiguity surrounding that circuit's definitions of reckless disregard and willful misconduct. *Saba* adopts a definition of willful misconduct that is the same in all practical respects as the definitions adopted in *Tuller* and

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[6] The district court insightfully discussed the *Tuller* opinion in its order, *see In re Crash Near Cali*, 985 F. Supp. at 1128 & n.15, and we adopt this discussion for the purposes of our analysis here.

Butler: "[w]illful misconduct is the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance." 78 F.3d at 666. The district court in *Saba* concluded that the carrier engaged in willful misconduct by recklessly disregarding an obvious risk—specifically, the possibility that inadequate packing procedures would expose cargo to water damage when the cargo was left outside in the rain. *Id.* at 670. The circuit court reversed, holding that reckless disregard cannot be based solely upon a finding that the risk was obvious. *Id.* at 669-70. Rather, the plaintiff must prove that the carrier subjectively knew that the carpets would be exposed to rain or that the packing procedures used would create a grave risk of water damage to the cargo if it rained. *Id.* at 670.

The District of Columbia Circuit labeled this analysis a subjective test because it "requires a showing of a subjective state of mind." *Id.* at 668. The court acknowledged that the carrier's subjective state of mind may be established solely by inferences taken from circumstantial evidence; the inferences thus act as "a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent." *Id. Saba's* test thus is satisfied if evidence allows an inference that the carrier "must have been aware" of a risk created by its conduct. *Id.* at 669. The court observed that its test is more stringent than an objective test that inquires only if the carrier "should have known" about the danger, because the test cannot be satisfied by showing merely "an extreme departure from standards of ordinary care." *Id.*

The holdings of *Saba*, *Berner*, and *Tuller* thus are not readily reconcilable and do not provide a clear definition of what is meant by reckless disregard in Convention cases. An examination of the interpretations of willful misconduct by other countries that are signatories to the Warsaw Convention reveals a lack of uniformity similar to that contained in United States case law. *Cf. Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226, 116 S. Ct. 629, 634, 133

L.Ed.2d 596 (1996) ("Because a treaty ratified by the United States is not only the law of this land, [cit.], but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation . . . the post-ratification understanding of the contracting parties."). According to one collection of case law interpreting the Warsaw Convention, foreign jurisdictions have adopted both subjective and objective tests for willful misconduct, with France, Germany, Greece, and Korea adopting objective tests and Switzerland adopting a subjective test. *See* Goldhirsch at 121 (collecting cases).[7]

This brief discussion addresses only a handful of the published cases that have construed willful misconduct under Article 25. Even this limited review, however, reveals a body of law that frequently is inconsistent and that provides a vague and nebulous definition of willful misconduct, rendering it difficult to apply. Under these circumstances, this ambiguity supports a conclusion that Montreal Protocol No. 4 clarifies, rather than effects a substantive change to, Article 25.

2. Declarations of Intent Concerning Montreal Protocol No. 4

Montreal Protocol No. 4 contains no statements concerning an intent to clarify or change prior law. We therefore will examine the drafting and legislative history of the amended language to discern the intentions behind enacting the amendment. As we have explained, Montreal Protocol No. 4 adopts the Hague Protocol's substituted language for Article 25; we therefore will look first to the drafting history of the Hague Protocol, where the negotiations surrounding the adoption of this language occurred.

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[7] Goldhirsch observes—without citing any cases—that the objective test is "the one usually applied" in United States courts when assessing claims of willful misconduct. *See* Goldhirsch at 121.

The delegates at the 1955 Hague Conference began their deliberations with a draft proposal that narrowed Article 25 to allow unlimited liability only where the carrier committed a "deliberate act or omission . . . done with intent to cause damage." ICAO Doc. 7686 LC/140, Vol. II, Documents 99 (1956). The Norwegian delegation proposed an amendment to Article 25 that would force the carrier to bear unlimited liability if "the act or omission was committed either with the intention to cause damage or recklessly by not caring whether or not damage was likely to result." *Id.* at 174. The Norwegian delegate explained this language to mean that "the person in question *understood that there might be damage caused by his act or omission*, but, nevertheless, he took the position of saying: 'I am quite indifferent as to whether damage will occur or not.' " ICAO Doc 7686-LC/140 Vol. 1, Minutes 196 (1956) (hereinafter "Hague Conference Minutes") (emphasis added). Other countries interpreted the proposal the same way. *See id.* at 194-96 (statements of Spanish and British delegates).

The Dutch delegation observed that, if the delegates intended to include a requirement that the carrier subjectively realize that damage likely would result from its actions, the Norwegian proposal's failure-to specify the requirement expressly left the proposal open to the same interpretive problems encountered with the language used in the original Convention. *See id.* at 197-98. The Dutch delegation thus proposed replacing the phrase "not caring whether or not damage was likely to result" with the phrase "with full realization of the reckless character of his or their conduct and of the danger that damage would result." *Id.* at 198. After several other delegates concurred with the Dutch proposal, the conference finally adopted the phrase "with knowledge that damage would probably result." *See id.* at 198-206. Significantly, both the Norwegian proposal and the final adopted languge reflected an effort to retain the same standard of conduct that had been adopted under the text of the Convention. *See id.* at 196 (statement by British delegate that "[o]ne of the most

important elements in cases decided by courts on the Warsaw Convention was that it must be shown that the servants or agents of the operator . . . had knowledge of the probable consequences of their acts"); *id.* at 197 (statement by United States delegate that the proposed alteration to Article 25, "although different in drafting from the text of the present Article 25, continued as nearly as possible to establish the same rules of law as existed in American jurisprudence").[8]

We next turn to the legislative history surrounding the United States' adherence to Montreal Protocol No. 4, which supports this interpretation. According to a report prepared by the Senate Committee on Foreign Relations, the language that replaces willful misconduct in Article 25 "does not modify the scope of the standard . . . [but rather serves as] a clarifying response to the difficulties that arose from differing translations of the text" of the original Convention. S. Exec. Rep. No. 105-20, at 15 (1998). In the view of the Senate Committee, the Protocol replaces the term "willful misconduct" with "the common law definition of 'willful misconduct.' " *Id.*

The State Department, in response to questions from members of the Senate Committee, explained further that the language contained in Montreal Protocol No. 4 "is merely an alternative interpretation of the original French text [of the Convention], developed to harmonize the various legal inter-

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[8] In fact, Nathan Calkins, the United States' delegate to the Hague Conference, wrote that:

> While the revised [Article 25] is believed to be substantially a paraphrase of the present Article 25 as it is administered by United States courts, there appears to be no doubt that it considerably tightens the article as it is now currently administered in certain foreign courts. Some foreign countries presently regard gross negligence as sufficient to bring this article into play. [Application of the revised language] would bring about the result of maintaining substantially the same rule of law as is presently applied in courts within the United States. . . .

G. Nathan Calkins, Grand Canyon, Warsaw and the Hague Protocol, 23 J. Air L. & Com. 253, 266-67 (1956).

pretations that had developed from the original." *Id.* at 47. Use of the term "willful misconduct" in the original Convention resulted, in the State Department's view, in a:

> discrepancy between common and *civil* law concerning the nature of conduct required to remove limits on liability. Because the concept of willful misconduct came to have different connotations in the civil and common law systems, the drafters [of the amended language] . . . replaced the legal standards with a description of the conduct itself.

Id. The State Department therefore concluded that "this change does not modify the scope of the standard," *id.*, and that "the amendment to Article 25 will have no practical effect on the rights of claimants in cases under the Warsaw Convention." *Id.* at 53.

The Senate Committee and State Department premised their views upon the express requirement in Montreal Protocol No. 4 that a passenger must prove that the carrier knew its conduct would likely result in damage. Among other things, the Senate report quotes two Second Circuit opinions that require passengers seeking to establish willful misconduct to prove knowledge on the part of the carrier that injury likely will result from its actions. *See* S. Exec. Rep. 105-20, at 53 (quoting *Pekelis v. Transcontinental & W. Airlines, Inc.*, 187 F.2d 122 (2d Cir. 1951), and *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955)). In fact, in *Grey*, the Second Circuit emphasized that "[t]here must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." 227 F.2d at 285.[9]

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[9] The Senate Report also quotes the Restatement (Second) of Torts' definition of reckless disregard, which does not require that an actor subjectively realize that his conduct is placing others at risk of harm. *See* S. Exec. Rep. 105-20, at 53 (quoting Restatement (Second) of Torts § 500 (1965) (actor is liable if he performs an act or fails to perform an act "knowing *or having reason to know* of facts which would lead a reasonable man to realize" that his conduct creates an unreasonable risk of harm and is substantially greater than is necessary to make his conduct

In sum, the Senate Committee and the State Department concluded that Article 25 always has required a passenger to prove knowledge on the part of the air carrier that its conduct would likely result in damage, and that Montreal Protocol No. 4 clarifies the existing law to codify expressly this requirement. We pay close attention to this conclusion, as "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *Tsui Yuan Tseng*, — U.S. at —, 119 S. Ct. at 671. At the same time, we are mindful of the admonition that subsequent legislative history purporting to clarify prior law should be viewed skeptically if it is inconsistent with a reasonable interpretation of the text and legislative history of the earlier enactment. *See GTE Sylvania*, 447 U.S. at 118 n.13, 110 S. Ct. at 2061 n.13. We therefore will examine the language and drafting history of the original Convention to ensure that the subsequent declarations of intent are consistent with the earlier law.

The delegates to the 1929 Warsaw conference drafted the Convention in French, and used the word "dol" to describe the level of misconduct that allows a passenger to bypass Article 22's liability cap.[10] Although the term "dol" has "no precise analogue in the English language," Second International Conference on Private Aeronautical Law, Oct. 4-12,

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negligent) (emphasis added)). We are unable to explain the inclusion of this citation in the Senate Report, as the Restatement's definition is impossible to square with the express language used in Montreal Protocol No. 4 and the remaining discussion contained in the Report. Under these circumstances, we cannot conclude that the citation is intended to contradict the express language of the Protocol and create an objective test under Article 25.

[10] The authentic French text of Article 25(1) states:

> Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol.

Godhirsch at 193.

1929, Warsaw, Minutes at v. (Robert C. Homer & Didier Legrez trans. 1975) (hereinafter "Warsaw Minutes"), "[i]t implies an act or omission that was done intentionally to cause a harm." Goldhirsch at 121. The use of the word "dol" resulted from the drafters' dissatisfaction with the phrase "intentional illicit act, which had been included in an earlier draft of Article 25. See Warsaw Minutes at 265.[11] Initially, the delegates could not agree on proposed substitutions to replace "intentional illicit act." The German delegation suggested the term "faute lorde, " which the delegates equated with a common-law gross negligence standard, *see id.* 58-59, 61, 278, 290, while the British delegation proposed to limit the exemption to acts committed deliberately for the purpose of injury. *See id.* at 298. The Brazilian delegate, Alcibiades Pecanha, presciently observed that the competing proposals raised the question whether the air carrier's conduct was to be measured by an objective or subjective standard, and consequently endorsed a compromise approach. *See id.* at 61.

Ultimately, the delegates rejected the inclusion of "faute lorde" and retained the French word "dol," adding that a court may apply the legal equivalent of "dol" as defined by the law of the forum jurisdiction. Warsaw Convention art. 25(1). As noted by British delegate Sir Alfred Dennis, the adopted language reflects the delegates' agreement that "dol" was to be translated into English as willful misconduct, *see* Warsaw Minutes at 213, which Sir Dennis defined as "cover[ing] not only deliberate acts but also careless acts done without regard for the consequences." *Id.* at 59-60.

The drafting history thus reveals that conferees rejected an effort to define willful misconduct to encompass gross negligence. Although Sir Dennis' characterization of willful misconduct suggests that the standard may be satisfied without establishing that the carrier knew its actions placed its pas-

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[11] In the draft considered at the Warsaw conference, the provisions contained in Article 25(1) of the Convention initially were found in Article 24. *See* Warsaw Minutes at 214. A subsequent amendment placed the provisions in Article 25(1).

sengers at risk, the language adopted by the conference does not expressly embody this characterization. We therefore find the 1929 drafting history to be ambiguous in this respect.

In sum, the recent legislative history surrounding Montreal Protocol No. 4 is consistent with a reasonable interpretation of the original text, and the drafting history for the original Convention does not suggest otherwise. Given the uniform and clear statements of those who enacted and adopted the amended language contained in Montreal Protocol No. 4, we find these statements to be persuasive indicators that the Protocol clarifies, rather than effects a substantive change to, existing law.

C. Summary of Law

For the reasons that we have explained, we conclude that Montreal Protocol No. 4 clarifies the definition of willful misconduct under Article 25, rather than effecting a substantive change in the law. The amended language provides a more precise articulation of the standard, requiring a passenger to prove that the carrier, or its servants or agents, acted: (1) "with intent to cause damage," or (2) "recklessly and with knowledge that damage would probably result." Montreal Protocol No. 4, art. IX, *reprinted in* Goldhirsch at 358. This definition of the standard replaces the less precise articulation set forth in *Butler*, including the reckless disregard standard employed by the district court. Under the clarified standard, we no longer inquire as to reckless disregard, but rather examine whether the pilots of Flight 965, at a minimum, acted recklessly and with knowledge that their conduct likely would result in damage.

Before applying the Protocol's clarified definition of the standard to this case, we believe it is necessary to comment upon the type of evidence that may be used to satisfy the standard. For this task, we refer to *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 811 (1994), where the Court announced its standard for "deliberate indifference" in Eighth Amendment cases. 511 U.S. at 837, 114 S. Ct. at 1979. The

Farmer Court's discussion is helpful here because the Court explained in great detail how a plaintiff may prove that a defendant subjectively knew that his or her actions would likely result in harm to the plaintiff. *See id.* at 836-44, 114 S. Ct. at 1978-82; *see also Saba,* 78 F.3d at 669 (analogizing the *Farmer* Court's discussion to a plaintiff s claim that air carrier engaged in willful misconduct under Article 25).

Farmer begins its analysis by dividing the legal definition of recklessness into two distinct standards, one measured objectively and the other subjectively. 511 U.S. at 836-37, 114 S. Ct. at 1978-79. An objective test, according to *Farmer,* examines whether an actor acts or fails to discharge a duty to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 836, 114 S. Ct. at 1978. A subjective test, on the other hand, asks whether an actor has disregarded a risk of harm of which he is aware. *Id.* at 836-38, 114 S. Ct. at 1978-79. Stated differently, to satisfy the subjective test the actor "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837, 114 S. Ct. at 1979. Because the language set forth in Montreal Protocol No. 4 also requires a plaintiff to establish that the carrier knows that its conduct likely will result in damage—in other words, that the carrier has drawn an inference that a risk of harm exists—Article 25 creates what *Farmer* defines as a subjective test.

Under *Farmer,* establishing knowledge on the part of the actor need not be accomplished solely by direct evidence; a factfinder is permitted to infer from circumstantial evidence that the actor actually drew the inference that the circumstances posed a substantial risk of harm. *Id.* at 842, 114 S. Ct. at 1981. Indeed, it is possible to premise this inference on "the very fact that the risk was obvious." *Id.* Obviousness of the risk thus plays a role in both the subjective and the objective tests. The difference, when the tests are put into practice, is a fine one. The objective test is satisfied if a grave risk is sufficiently obvious, because the person "should have" been

aware of the risk regardless of whether he actually recognized it. *See Saba,* 78 F.3d at 669. The subjective test, on the other hand, precludes a finding of liability if the factfinder concludes that, even though a grave risk is obvious, no inference can be made that the actor actually became aware of the risk. *See Farmer*, 511 U.S. at 844, 114 S. Ct. 1982 ("That a trier of fact may infer knowledge from the obvious . . . does not mean that it must do so."). In this way, a plaintiff may rely solely upon circumstantial evidence related to the obviousness of a grave risk to satisfy both tests, but the subjective test is satisfied only if the circumstances also permit an inference that the actor "must have known" about the risk. *Id.* at 842-43, 114 S. Ct. at 1981-82. "It is not enough merely to find that a reasonable person would have known, or that the defendant should have known," of the risk. *Id.* at 843 n.8, 114 S. Ct. 1982 n.8. Thus, while an objective test asks whether an actor "should have known" of an obvious risk, the subjective test requires, at a minimum, a showing that the actor "must have known" of the risk. *Cf. Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998).[12]

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[12] Courts have spoken of a "liability continuum" that runs from simple negligence to intentional conduct undertaken with the purpose of harming others. *See Saba,* 78 F.3d at 668. The subjective test described in this opinion lies closer on this continuum to intentional misconduct than does the objective test. While we take great care to specify that the two standards are distinct, we acknowledge that the differences are indeed subtle, especially when a plaintiff relies solely on circumstantial evidence. *Cf. West v. Waymire,* 114 F.3d 646, 651 (7th Cir.) ("Granted, there may be less here than meets the eye. The difference between a 'plainly obvious' and an actually known danger—the critical difference between the [subjective] and [objective] standards of recklessness—may have little significance in practice, given the difficulty of peering into minds. . . ."), *cert. denied,* — U.S. —, 118 S. Ct. 337 (1997); Goldhirsch at 122 ("Despite the difference in approach [in a subjective and objective test], the results are more or less the same. In cases where the courts have applied the subjective test, the wrongdoer's knowledge of harm was often implied. Therefore, a case that purports to use the subjective standard but which accepts circumstantial evidence to prove the state of mind of the wrongdoer is so closely akin to an objective test that there is no longer any necessity to distinguish between the two.").

D. Entry of Summary Judgment Against American

Having determined the proper test to be applied, we now turn to American's argument that the district court improperly entered summary judgment in favor of the passengers on the issue of willful misconduct. Without having the benefit of Montreal Protocol No. 4's more precise language, the district court applied a test for willful misconduct that is at odds with the conclusions contained in our opinion. Acting perhaps out of an abundance of caution, however, the district court held in the alternative that, because the pilots of Flight 965 decided to continue descending even though they knew they were off course in a dangerously mountainous region, Piamba Cortes was entitled to summary judgment on the issue of willful misconduct even under a subjective test. If correct, the district court's decision maybe affirmed on this ground without requiring a remand.

We review a district court's entry of summary judgment *de novo*. *See City of Tuscaloosa v. Harcros Chems, Inc.*, 158 F.3d 548, 556 (11th Cir. 1998). Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In assessing whether the movant has met its burden of demonstrating the absence of a genuine issue of fact, the court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *See Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). An issue of fact is genuine, thus barring the entry of summary judgment, unless "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).[13]

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[13] Like the district court, we reject American's broad assertion that, because Article 25 requires a factual finding regarding an actor's state of mind, the issue defies determination as a matter of law on summary judgment. *See In re Air Crash Near Cali*, 985 F. Supp. at 1123, 1124 ("[T]he principles of Rule 56 apply to all lawsuits. . . . [E]ven

Piamba Cortes argues that the pilots of Flight 965 knew that, by continuing their descent even though they knew the plane was off course in a mountainous region, their conduct likely would result in harm to the passengers. To justify entering summary judgment in her favor on this claim, Piamba Cortes must show that no genuine dispute exists with respect to three distinct factual issues: (1) the pilots of Flight 965 knew that the plane was significantly off course in a mountainous region; (2) the pilots knowingly elected to continue descending the plane; and (3) the pilots knew that descending the plane under such circumstances would likely result in harm to the passengers.

The second and third issues are easily resolved in Piamba Cortes' favor. The record is replete with convincing circumstantial evidence that both Tafuri and Williams knew that continuing a descent in a mountainous region when the aircraft was significantly off course would create a risk of danger to the passengers. Most compelling, however, is the fact that American did not argue to the contrary in the district court and does not argue to the contrary on appeal. Tafuri and Williams' awareness that such conduct would create a risk of injury to passengers therefore is not at issue here.

The same is true with respect to the pilots' knowledge that the plane was descending. Statements by the pilots recorded by the cockpit voice recorder reveal that the pilots were actively monitoring the plane's altitude during the descent. Furthermore, American once again poses no argument to the contrary on appeal.

The final, and most difficult, question is whether the pilots in fact knew that the aircraft was off course while it was descending. We narrow this inquiry to reflect the fact that, in

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assuming that the term willful misconduct requires a subjective inquiry . . . , there are many instances in the law where the evidence of state of mind is so unequivocal that summary judgment is proper and, indeed, expressly mandated by Rule 56."). Our holding that Piamba Cortes' evidence fails to meet this standard does not imply that, given a different set of facts, a passenger cannot be awarded summary judgment with respect to the application of the Convention's liability cap under Article 25.

order to enter summary judgment in favor of the passengers, the pilots must have known that the aircraft was "significantly" off course[14]—in other words, at risk of leaving the valley while the pilots continued their descent. If the pilots believed that the plane was *slightly* off course, yet well within the safety of the valley, a factfinder reasonably might infer that the pilots were not actually aware that their actions probably would result in injury to the passengers.[15] On the other hand, the pilots need not have realized that the aircraft had flown all the way out of the valley to realize that their conduct placed the passengers at risk of harm. As American concedes, if the pilots knew the plane was significantly off course, the only reasonable inference a factfinder could make is that the pilots knew the plane was at risk of crashing into the mountains. Consequently, entry of summary judgment in favor of Piamba Cortes hinges upon a narrow finding that a reasonable juror could only infer that Tafuri and Williams realized the aircraft was significantly off course during the time they continued their descent.

The district court concluded that the only plausible inference to be taken from the evidence was that the pilots knew that they had strayed significantly away from the published arrival path. We agree with the district court that a reasonable factfinder must conclude that the pilots knew they were off course. We disagree, however, that the *only* reasonable inference was that the pilots knew they were *significantly* off course; to the contrary, even though more plausible interpretations suggest otherwise, a factfinder reasonably might conclude that the pilots believed they were near enough to the

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14 The district court also used the words "profoundly" and "radically" off course.

15 The converse, of course, also is true, that even if the pilots believed they were close to the published flight path, it is possible to infer that the pilots nonetheless recognized that their conduct placed the passengers at risk of injury, thus creating a question to be resolved by the factfinder. As we explain, however, this inference is not mandatory under the facts of this case.

published arrival path that they did not realize they had placed the passengers at risk of harm.

The district court set forth a detailed and thorough account of the circumstantial evidence supporting a finding that the pilots realized they were not on the published flight arrival path to Cali. *See generally In re Crash Near Cali,* 985 F. Supp. at 1138-43. This occurred after the pilots mistakenly entered "Romeo" instead of "Rozo" into the FMC and the plane turned east toward the mountains. According to the district court, the pilots likely would have realized that, in light of the amount of time they had been flying east, the aircraft in fact was significantly off the published course to the Tulua way point. Nonetheless, the evidence did not show conclusively that the pilots perceived the amount of time that they had been flying east toward the mountains, thus allowing a reasonable inference that the pilots believed the aircraft to be near the published arrival path even after the turn. *Id.* at 1140. The circumstances changed, however, at the moment marked 21:38:54 on the cockpit voice recorder, when the pilots realized that the aircraft was headed in the wrong direction and must turn to the right to intercept the proper course. As summarized by the district court, the pilots' statements—such as "[w]here're we going" and "we got fucked up here didn't we?"—added with expert testimony describing this portion of the flight—allow only one reasonable inference: that the pilots realized that the plane was not on the published arrival path.

The evidence is not equally compelling, however, with respect to the pilots' knowledge of the *extent* that they had traveled off course. We agree with the district court that, given the pilots' statements on the cockpit voice recorder, a highly plausible inference to be taken from the evidence is that "the pilots did not even know precisely where they were in the sky." *Id.* at 1142. Nonetheless, at one point during the pilots' discussion of the aircraft's location Tafuri says, "You're okay, you're in good shape now," which the district court concedes "can be read as an indication that Tafari, at

least, believed the plane was on or very near the published route." *Id.* at 1143.

The district court considered this statement by Tafuri in the context of other circumstantial evidence. We do the same, and conclude that evidence relating to the plane's instrument readings permit a reasonable inference that Tafuri's statement actually reflects a belief that the plane was not at risk of leaving the valley. At the moment marked 21:39:24 on the cockpit voice recorder, Tafuri dialed the correct frequency for the Tulua way point into his EHSI, which prompted the plane's D-bar indicator to shift on the computer screen. Up until that moment, the EHSI had been programmed using the frequency for an incorrect way point located well to the east of the valley, thus causing the D-bar indicator to indicate that the Tulua way point was located to the left of the plane. American argues that the shift of the D-bar indicator allowed Tafuri to believe that they had passed the Tulua way point or a vector leading to the published arrival path, and thus supports a conclusion that Tafuri believed that he was close to the published arrival path and needed only to continue a right-hand turn in order to intersect the arrival path.

Piamba Cortes and the district court offer several reasons why this inference should be rejected as unreasonable.[16] First, the compass heading during this portion of the flight was approximately 120 degrees compared to the proper compass heading (a radial heading south and slightly west at approximately 202 degrees) used in the published arrival path. The district court found that even a brief glance at the compass heading would have informed the pilots that they had veered

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16 The district court's discussion of the permissible inferences to be taken from the plane's instruments is contained in the portion of the order addressing whether the pilots engaged in willful misconduct as measured under an objective test, and thus the district court's analysis is framed in the context of whether the pilots "should have recognized" how far they veered off course based on this evidence. The reasoning underlying the district court's discussion nonetheless is useful to our discussion of whether the pilots "must have known" how far they veered off course.

dramatically off course. Second, once Tafari dialed the proper frequency for the Tulua way point, the pilots necessarily realized that the Tulua way point was located to the left and behind the plane; thus, the district court found that the right-hand turn executed by the pilots was inconsistent with an attempt to fly over the Tulua way point or to intercept the flight path. Third, the pilots noted at one point that their distance to the airport was thirty-eight miles, but recognized that this distance remained thirty-eight miles even after the passage of one minute and fourteen seconds, which the district court found would have communicated to the pilots not only that they were not heading towards the airport, but that they had traveled a significant distance off course.

Considered together, this circumstantial evidence certainly permits a factfinder to infer that the pilots realized that the aircraft had veered significantly off course. This interpretation, however, is not the *only* reasonable inference that can be taken from this evidence, as the entry of summary judgment requires. No evidence conclusively demonstrates that the pilots actually monitored their compass heading, or that the pilots in fact recognized that, because they failed to reduce the distance between the aircraft and the airport, they had traveled a significant distance from the published flight path. If the pilots failed to put these connections together, a factfinder reasonably may infer that the shift in the D-bar indicator led the pilots to believe that they had just intersected the vector leading to the published flight path and thus were close to the flight path and within the valley. Combined with the plausible inference taken from Tafuri's comment that "[y]ou're okay, you're in good shape now," it is not unreasonable to infer that the pilots believed they were close to the published flight path and thus did not recognize that their actions placed their passengers at risk of injury.

Piamba Cortes also places great reliance upon the fact that Tafuri and Williams' actions violate FAA regulations and the principles of flying in Latin America that American teaches its pilots. We agree with Piamba Cortes that the pilots' fail-

ure to comply with their training and with FAA regulations certainly constitute circumstantial evidence that supports a finding that Tafuri and Williams knew their conduct placed the passengers at risk. Under the totality of the evidence in this case, however, a factfinder may reasonably infer that, despite the pilots' training and compliance with FAA regulations, they were not subjectively aware at the time they executed their descent into Cali that the descent probably would result in damage.[17]

The District of Columbia Circuit observed that when "no one knows exactly what happened" to cause a pilot to commit errors and crash and the plaintiff has no unequivocal direct evidence, "questions [of willful misconduct] depend upon inferences to be drawn from essentially circumstantial evidence . . . [and] [o]ne can hardly imagine a clearer case in which such questions should have been left to the jury." *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1481 (D.C. Cir. 1991) (first and third alterations in original). Of course, *Korean Air* did not include a recording of the pilots' conversations in which they stated that they were off the published arrival path. Nonetheless, under the circumstances of this case, other statements in the pilots' conversation and circumstantial evidence permit a reasonable inference that the pilots believed they were close to the flight path, creating a question of fact whether the pilots recognized that their conduct probably would result in damage.

For these reasons, we conclude that the district court erred in entering summary judgment against American with respect to unlimited liability under the Warsaw Convention. We therefore vacate the district court's entry of summary judgment on the issue of American's liability in excess of the Convention's liability cap, and remand for a determination by the trier of

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17 Piamba Cortes also places great reliance upon "admissions" that American has made during the course of the proceedings. In our view, none of the admissions, when viewed in a light most favorable to American, compel a finding that Tafuri and Williams knew that Flight 965 was significantly off course or that Tafuri and Williams knew that their conduct likely would result in damage.

fact whether Piamba Cortes may seek compensatory damages in excess of the limit created by the Convention.

III. CONFLICT OF LAWS CONCERNING COMPENSATORY DAMAGES

The district court concluded that, under the relevant conflict-of-laws rules,[18] Florida's compensatory damages scheme governed all claims arising from the crash of Flight 965 that were filed in the Southern District of Florida, regardless of whether the claims were filed on behalf of domiciliaries of Florida or Colombia. The district court therefore applied Florida law to determine the compensatory damages to which Piamba Cortes was entitled for the death of her sister, who was a domiciliary of Colombia at the time of the crash. American argues that the proper conflict-of-laws analysis must focus upon the decedent's domicile, and thus the district court should have applied Colombia's compensatory damages scheme to Piamba Cortes' claims.

A district court's resolution of a conflict-of-laws issue is a legal question that we review *de novo*. *See LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1514-15 (11th Cir. 1997).

Before turning to the merits of this issue, it is necessary to clarify the scope of this opinion as it relates to the many cases arising out of the crash of Flight 965. In its order on conflict-of-laws issues, the district court determined that, with certain limited exceptions, Florida compensatory damages law applies across the board to all cases filed in the Southern District of Florida. Here, we are presented with a much narrower

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[18] American removed this case to federal court under both diversity and federal question jurisdiction. The district court observed that Florida's conflict-of-laws rules are the same as federal common-law conflict-of-laws rules, because both have adopted the Restatement (Second) of Conflict of Laws. *See* SR-365-5-6 n.3. Therefore, the same rules would be applied under either diversity jurisdiction or federal question jurisdiction. *See id.*

inquiry, that is, determining which compensatory damages law must be applied to Piamba Cortes' claims. Although the district court at times considered the conflict-of-laws problem in the context of all the passenger lawsuits aggregated together—in other words, regardless of the domiciles of the individual decedents—the district court tailored its final resolution of the conflict-of-laws problem by separating the decedents by domicile. *See, e.g.*, SR-365-30n.10. The district court thus relied upon independent reasons for applying Florida compensatory damages law to claims involving decedents who, like Piamba Cortes' sister, were domiciliaries of Colombia. Consequently, we are able to review the district court's ruling as it pertains specifically to Piamba Cortes' claims. Our analysis focuses upon this narrow issue, however, and we do not purport to review the conflict-of-laws issues raised by any other cases related to the crash of Flight 965.

A. Applicable Law

Piamba Cortes' claims arise under the Warsaw Convention, which provides that air carriers shall be liable "for damage sustained" in the event of the death or wounding of a passenger on a flight that falls under the scope of the Convention. Warsaw Convention art. 17. In *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996), the Supreme Court held that, with respect to the types of compensatory damages awarded to passengers, the Convention "provide[s] nothing more than a pass-through, authorizing [courts] to apply the law that would govern in absence of the Warsaw Convention." 516 U.S. at 229, 116 S. Ct. at 636. Here, the district court concluded that the question of compensatory damages created a conflict-of-laws problem and thus applied the "most significant relationship" test articulated in the Restatement (Second) of Conflict of Laws (1971) (hereinafter "Restatement"). The parties do not challenge this decision.

The Restatement provides that, in a wrongful death action, "the local law of the state where the injury occurred deter-

mines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied." Restatement § 175 (general rule); *see also id.* § 178 (specific rule for wrongful death actions). This preference for the state in which the injury occurred all but disappears, however, when the conflict of laws involves the issue of damages in wrongful death actions. As the commentary observes, the fact that conduct leading to a wrongful death—as well as the death itself—occurred in a certain jurisdiction does not, by virtue of these contacts alone, create a significant interest for that jurisdiction to apply its damages law to a subsequent lawsuit. *See id.* § 178 cmt. b. Courts instead are instructed to refer to the general conflict-of-laws principles set forth in section 6, as well as principles specific to tort claims set forth in section 145, to identify jurisdictions that possess the greatest interest in applying their compensatory damages schemes. *See id.* §§ 175 & 178. For these reasons, no rigid rules exist for resolving conflict-of-laws problems in wrongful death actions governed by the Restatement, requiring instead an examination of the interests created by the facts and circumstances presented in each case. *See Judge v. American Motors Corp.*, 908 F.2d 1565, 1568 (11th Cir. 1990).

B. Interested Jurisdictions Under Section 145

Section 145 lists four types of contacts to be taken into account when identifying jurisdictions that possess an interest in applying their compensatory damages schemes:

> (a) the place where the injury occurred;
>
> (b) the place where the conduct causing the injury occurred;
>
> (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

Restatement § 145(2). Under the facts and circumstances of this case, we identify four jurisdictions that possess interests in applying their compensatory damages schemes to this case: Colombia, the place of the crash and the domicile of both the plaintiff and the decedent; Florida, the domicile of the two deceased pilots and the state in which their estates were probated,[19] as well as a place where American transacts significant business; Texas, the principal place of American's business; and Delaware, the state of American's incorporation. The parties argue in favor of only two jurisdictions, Colombia and Florida, so we need not consider further the interests of Texas and Delaware.

American argues that Florida's interests in this case are illusory for two reasons. First, American observes that it agreed to satisfy any judgment against the estates of the pilots, thus eliminating the contacts created by these defendants. American further points out that Piamba Cortes dismissed her claims against the pilots' estates several months after the district court resolved the conflict-of-laws issue. Second, American argues that its business activities in Florida are not sufficient to create a relationship with Florida under section 145(2)(c). We consider each argument in turn.

American's agreement to satisfy a judgment against the estates of the two pilots does not, under the circumstances of this case, extinguish the relationship with Florida under section 145(2). We first observe that American has not pointed to any evidence in the record to support its assertion that such an agreement exists. Even if such evidence existed, satisfaction agreements may be disputed in later stages of litigation and do not always remove the defendant entirely from the scope of the case. Of equal concern is the possibility that a defendant, seeking to avoid the application of a jurisdiction's generous damages scheme, could agree to satisfy judgments

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19 In her Complaint, Piamba Cortes named the estates of the two pilots as defendants.

against any co-defendants who are domiciliaries of that jurisdiction. We do not imply, of course, that American's agreement with the estates of the two pilot defendants reflected this type of strategic behavior; we make the observation solely to demonstrate the possibilities for opportunistic conduct that might arise if such agreements could dictate the results of conflict-of-laws problems.

Piamba Cortes' decision to dismiss her claims against the estates of the pilots several months after the district court resolved the conflict-of-laws issue does not alter our conclusion. American has not shown, and does not argue, that at the time of the district court's decision the estates were improperly named parties to the lawsuit. Consequently, at the time the district court resolved the conflict-of-laws issue, the inclusion of the pilots' estates as defendants created a viable relationship with Florida.[20]

Second, American's argument concerning the insufficiency of its business contacts with the state of Florida misconstrues the language used in section 145. According to American, a state has a relationship under section 145(2)(c) only if the state is a party's "principal place of business." The text of the Restatement, however, directs courts to consider the "place of business of the parties." Restatement § 145(2)(c). The authors of the Restatement were familiar with the term of art "principal place of business" and used it several times in the commentary to section 145, *see* § 145 cmt. e, at 421. Given the authors' use of the less specific phrase "place of business" in the text of the section, as well as in other portions of the commentary, *see id*, we conclude that, had the authors intended to limit § 145(2)(c) to a corporation's "principal place of business," they would have done so expressly.

We agree that a party's principal place of business ordinarily should be afforded more weight than a jurisdiction in

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[20] Because the record contains no indication that the estates of the two pilots were improperly named defendants in this case, we need not concern ourselves with the possibility that Piamba Cortes included these defendants solely for forum-shopping purposes.

which the party has only business interests, but we cannot agree that a jurisdiction in which the party has sizeable business activities—especially when the activities are directly related to the relevant litigation—has no relationship with the litigation for purposes of section 145(2). This case exemplifies this principle, as the district court found not only that Miami serves as one of American's primary transportation hubs, but also that Miami is the site from which American orchestrates its Latin American operations. Consequently, while we do not overstate the relationship created by these circumstances, *see id.* ("[t]he fact . . . that one of the parties . . . does business in a given state will usually carry little weight of itself"), we conclude that American's substantial business activities in Florida in this case justify the district court's finding that Florida has an interest in this litigation under section 145(2).

C. Most Significant Interests Under Section 6(2)

Having identified both Florida and Colombia as interested sovereigns, we now must specify which sovereign's interests are more "significant." *Judge*, 908 F.2d at 1569.

> To discharge this task, we cannot simply add up the factors delineated in section 145(2) and then apply the law of the sovereign with the greatest numerical total. . . . Rather, we must, as mandated by section 145(1), turn to the factors delineated in section 6 to determine which sovereign has the most significant contact.

Id. Section 6(2) lists seven factors to consider when weighing the interests of a sovereign in a particular case:

> (a) the needs of the interstate and international systems;
>
> (b) the relevant policies of the forum;
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of a particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

Restatement § 6(2)(a)-(g). As we explain, the importance of these factors varies depending on the nature of the issue that underlies the conflict of laws. *Id.* § 145 cmt. b.

1. Balancing of Interests Under Sections 6(2)(b) and (c)

We observed in *Judge* that the section 6(2) analysis for wrongful death claims "turns in large part on the balance of competing interests contemplated by sections 6(2)(b) and 6(2)(c)." 908 F.2d at 1569. This balancing occurs in three steps. First, we identify the particular rule of law to be applied by each interested state. *Id.* Second, we identify the purposes or policies underlying each state's rule. *Id.* Third, we "assess the degree to which the purposes underlying each rule would be furthered by the rule's application." *Id.* at 1569-70. "As a general proposition, 'it is fitting that the state whose [policy] interests are most deeply affected should have its local law applied.' " *Id.* at 1570 (citation omitted).

Identifying the particular rule of law to be applied by each interested state has proven to be a difficult enterprise. Florida law is rather straightforward, permitting "survivors," meaning one's spouse, children, parents, dependent blood relatives, and adoptive siblings, to collect the value of lost support and services, future loss of support and services, loss of companionship or parental companionship, mental pain and suffering, medical or funeral expenses, loss of earnings, and net accumulations. Fla. Stat. Ann. §§ 768-18 & 768.21 (West 1997). Identification of the proper Colombian law that would apply in this case, on the other hand, raised "pervasive and profound" differences of opinion among the parties not only

on the subject of the proper elements of compensatory damages, *see* SR-365-19-26, but also on the role of judicial authority under Colombia's civil law system to resolve this question. *See id.* at 27-29. After an exhaustive examination of Colombia's law on compensatory damages, the district court found itself unable to reach any final conclusions with respect to whether limitations exist in the types of compensatory damages recoverable under Colombian law. *See id.* at 19.

American nonetheless assumes on appeal that Colombian law imposes a cap on the recovery of non-pecuniary damages (approximately $8,000) and disallows recovery of net accumulations. American does not challenge directly the conclusions of the district court with respect to the lack of clarity in Colombian law; if American intended to do so implicitly, it points to no evidence that calls into question the district court's ruling.[21] Even so, because we conclude that the district court correctly applied Florida's compensatory damages scheme regardless of whether Colombian law restricts recovery, we will follow American's assumption for purposes of our analysis in this opinion. We nonetheless observe that, under the present state of the record, it is equally likely that Colombian law imposes none of the limitations alleged by American; under such circumstances, the conflict of laws at issue in this appeal essentially vanishes, providing a separate ground for affirming the decision of the district court.

We are able to identify several policies that underlie Colombia's compensatory damages scheme as described by

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21 American cites only an affidavit prepared by its expert, a Colombian law professor and former judge, that suggests that Colombian law caps non-pecuniary damages and restricts recovery of net accumulations. American, however, overlooks a contrary affidavit prepared by a former judge of Colombia's Supreme Court of Justice that states that no such limitations exist. *See* SR-365-20-22. The district court considered both affidavits, performed its own review of the relevant Colombian legal authority, and found that the record did not conclusively establish the validity of either position. *Id.* at 22-29. American's citation to the affidavit filed by its expert, by itself, fails to persuade us that the district court's analysis is erroneous.

American. First, the law seeks to compensate Colombian domiciliaries for the wrongful death of a relative caused by a third party. Second, the restrictions on recovery serve to protect domiciliary defendants from what Colombia has deemed to be excessive damages awards. American extends this goal to non-domiciliary defendants as well, arguing that the restrictions on damages encourage foreign corporations to transact business in Colombia without fear of oppressive damages awards.

Similarly, the primary purpose underlying Florida's compensatory damages scheme is "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." Fla. Stat. Ann. § 768.17. Although Florida has not enacted restrictions on recovery similar to those adopted by Colombia, we agree with the district court that a secondary purpose underlying Florida's compensation scheme is that damages awards are sufficient to compensate survivors of a decedent while not posing an excessive and unfair burden upon domiciliary defendants. *Cf.* Fla. Stat. Ann. § 768.74(1) (conferring discretion to courts to review damages awards to ensure that they are neither excessive nor inadequate).

We first examine whether Colombia's policy of compensating its domiciliaries would be served in this case. Piamba Cortes argues that, if another available jurisdiction's compensatory damages scheme is more generous than Columbia's scheme, Colombia's policy of compensating survivors of the decedent would be frustrated by applying its less generous compensatory damages scheme. The district court concluded that, although Colombia's interest in applying its less generous compensatory damages scheme "might diminish" under these circumstances, Colombia nonetheless possesses a "compelling" interest in applying its damages scheme in cases involving Colombian decedents injured on Colombian soil. SR-365 38. We agree with the district court. The fact that the decedent was a domiciliary of Colombia, combined with the fact that the primary claimants—including Piamba Cortes—also are Colombian domiciliaries, creates an interest on

Colombia's behalf to ensure proper compensation for these claimants.

The same cannot be said with respect to the policies underlying Colombia's restrictions on compensatory damages. No Colombian domiciliaries are named as defendants, and the general rule in this circuit is that "a limit on recovery should not be applied when there is no domiciliary defendant because it advances no policy behind the limitation." *Foster v. United States*, 768 F.2d 1278-1283 (11th Cir. 1985). Notwithstanding this general rule, we have recognized in *dicta* that a restrictive damages scheme may be designed to encourage non-domiciliary corporations to transact business within a jurisdiction and that this policy may be furthered by applying the scheme to a non-domiciliary defendant. *See Judge*, 908 F.2d at 1572-73. We also observed that, although the "foreign investment interest" theory is plausible, a party invoking the theory must adduce evidence to support the assumptions underlying the theory. *Judge*, 908 F.2d at 1572-73. In this case, the district court found that American had adduced no evidentiary support for this theory, *see* SR-365-35, and American points to no evidence on appeal to discredit this finding. In the absence of such evidence, the assumptions underlying this theory are "too strained to merit serious weight under section 6(2)(c)," *Judge*, 908 F.2d at 1573, and the district court correctly rejected American's argument.

We next examine whether the policies underlying Florida's compensatory damages scheme would be furthered by applying Florida law to this case. As the district court noted, the policies underlying Florida's compensatory damages scheme for wrongful death claims would indeed be served if claimants filing on behalf of the decedent included Florida domiciliaries. Piamba Cortes, however, identifies no Florida domiciliaries among the possible survivors who possess a claim under Florida law in this case. In fact, our review of the record reveals that the decedent was, and the primary claimants are, domiciliaries of Colombia. Although Florida's compensatory damages scheme is apparently more generous

than Colombia's, the purpose underlying Florida law is to provide an adequate remedy for its *own* domiciliaries. Fla. Stat. Ann. § 768.17. Florida thus possesses no interest in compensating domiciliaries of other jurisdictions more richly than they would receive in their own courts. *See In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147, 1175 (5th Cir. 1987) (Gee, J., concurring in part and dissenting in part), *vacated on other grounds sub nom. Pan Am. Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S. Ct. 1928, 104 L.Ed.2d 400 (1989).

Florida nonetheless retains an interest in ensuring that a compensatory damages award against its own domiciliary defendants is not excessive. In this case, Piamba Cortes named as defendants the estates of the pilots, who were domiciliaries of Florida and whose estates were probated in Florida. Consequently, although Florida's interest in this case is not as compelling as Colombia's interest in applying its compensatory damages scheme to the claims of its own domiciliaries, the fact remains that this interest would be furthered by applying Florida's compensatory damages scheme to this case.

In sum, the policies of both Colombia and Florida would be furthered by applying their compensatory damages schemes to this case. Balanced together, this analysis weighs slightly in favor of applying Colombian law because, as noted above, the policy to be served under Colombian law is more compelling than the policies served by applying Florida law. This conclusion, however, does not end our analysis under section 6(2), and we must proceed to examine the remaining factors.

2. Remaining Factors Under Section 6(2)

Section 6(2)(a) reminds courts that the resolution of a conflict-of-laws problem should "further harmonious relations between states and . . . facilitate commercial intercourse between them." Restatement § 6 cmt. d. Noting that the choice of the damages law to be applied to this case must accommodate existing political and commercial relationships, the

district court concluded that both Florida and Colombia law "could be applied across the board without significantly disturbing interstate comity." SR-365-45. We agree. If we continue to accept, for the sake of argument, American's contention that Colombia has adopted a more restrictive compensatory damages scheme,[22] the absence of a defendant who is a Colombian domiciliary and who would benefit from Colombia's damages scheme allows Florida's more generous law to be applied without threatening international comity. Likewise, because no claimant is a domiciliary of Florida, the application of Colombia's more restrictive damages scheme would pose no threat to international comity as well. This factor therefore favors neither Florida nor Colombia.

The commentary to the Restatement advises that the factors listed in sections 6(2)(d) and (f) typically have little significance in tort cases. *See* Restatement § 145 cmt. b, at 415-16. It is rarely the case that parties in a tort suit—especially when the injury is unintended—plausibly can argue that they possessed justified expectations concerning the law to be applied to the suit or planned their conduct according to a jurisdiction's damages law. *See id.; see also id.* § 6 cmt. g (in unintentional harm suits, "the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question"); *id.* § 6 cmt. I ("Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions."). This commentary accurately describes this case, where no evidence suggests that the decedent's travel plans, or the plans of any claimants, hinged upon the advance recognition of, or reliance on, either jurisdiction's law governing compensatory damages. As a result, we heed the Restatement's advisory that, "[b]ecause of the relative insignificance of [factors (d) and (f)] . . . in the

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22 As discussed earlier, if Columbian law does not contain the restrictions on damages as described by American, the conflict of laws presented in this appeal essentially vanishes, providing a separate ground for affirming the district court.

tort area of choice of law, the remaining factors listed in § 6 assume greater importance." *Id.* § 145 cmt. b at 416.

We next consider the policies underlying the field of law involved in the lawsuit pursuant to section 6(2)(e). The commentary to the Restatement instructs that, where the policies of the interested states are largely the same but the rules contain minor differences, "there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved."[23] Restatement § 6 cmt. h. Although a number of important policies underlie the field of tort law, the Restatement identifies two in particular: the provision of compensation for injured victims and the deterrence of tortious conduct. *Id.* § 145 cmt. b, at 416. If we continue to accept, for the sake of argument, American's contention that Colombia's compensatory damages scheme is more restrictive than Florida's,[24] application of Colombian law arguably would frustrate these goals by limiting the amount the tortfeasor must pay to compensate the victim and her survivors. Consequently, this factor weighs slightly in favor of applying Florida law.

Finally, we consider the ease in determination and application of the law to be applied under § 6(2)(g). Here, two eminent Colombian jurists and scholars expressed profound disagreement whether Colombian law caps non-pecuniary damages and restricts the recovery of net accumulations, and the district court's review of the available legal authorities failed to reconcile this debate. The district court therefore concluded that the process of determining and applying Colombian law would be extremely complicated, expensive,

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[23] The field of law involved in this lawsuit is the law of torts. The policies undlerying tort law are not necessarily the same as the policies underlying a particular rule or statute adopted by an interested jurisdiction. The latter are considered under § 6(2)(b) and (c). Here, we consider only the policies underlying the law of torts.

[24] The observation expressed in footnote 24 applies with equal force to our discussion here.

and time consuming. As recognized earlier, American assumes on appeal that Colombian law unequivocally contains these restrictions but relies only upon the same evidence presented to the district court to support this assumption. This showing fails to persuade us that the district court's interpretation of Colombian law was erroneous. Because the measure of compensatory damages available under Florida law is straightforward and easy to apply, we conclude that this factor weighs heavily in favor of applying Florida law.

D. Summary

The resolution of a conflict-of-laws problem "represents an accommodation of conflicting values." Restatement § 6 cmt. c. This case is no exception. On the one hand, the policies underlying each jurisdiction's compensatory damages scheme weigh slightly in favor of applying Colombian law. On the other hand, the policies underlying tort law, as well as the severe difficulties in determining and applying Colombian law, weigh in favor of applying Florida law.

Given the circumstances of this case, an overall balancing of these factors tips in favor of applying Florida law. Although Colombia possesses an interest in applying its compensatory damages scheme to the claims of Colombian domiciliaries on behalf of a Colombian decedent, the absence of a Colombian defendant who would benefit from Colombia's more restrictive damages scheme renders these interests less compelling. In contrast, the application of Florida law furthers the policies underlying Florida's compensatory damages scheme as well as the field of tort law in general, and—importantly—would not frustrate the policies underlying Colombia's damages scheme.

Consequently, the scales are approximately even when we come to the problem of ascertaining Colombia's law on compensatory damages in wrongful death cases. In light of the severe difficulties presented by such an exercise, the well-defined and straightforward rules of Florida law tip the scales in favor of applying Florida's compensatory damages scheme

to this case. Indeed, this case serves as an ideal example of how this factor, as contemplated by the Restatement itself, can assume particular significance when the tremendous expenditures of time and resources necessary to interpret and apply an interested jurisdiction's law would exact a significant toll on the parties as well as the court.

For these reasons, we conclude that the district court correctly determined that Florida law governed the compensatory damages to be awarded to Piamba Cortes.

IV. APPOINTMENT OF LIABILITY

American next argues that the district court erred by refusing to apply Florida's comparative fault statute, which directs courts to apportion liability for noneconomic damages according to fault.[25] According to American, although the Warsaw Convention contains no express language providing for apportionment of liability, Article 17's broad language on the issue of damages acts as a "pass-through" to local law and thus requires the application of Florida's apportionment statute. The district court rejected this argument, holding that the overall scheme of liability created by the Convention obliges the air carrier to be liable for all damage sustained by a passenger. *In re Crash Near Cali*, 985 F. Supp. at 1153.

American's claim requires us to determine whether the district court properly construed the terms of the Warsaw Convention, which is a question of law that we review *de novo*. *See Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994).

Article 17 of the Warsaw Convention provides that an air carrier "shall be liable for damage sustained in the event of the death or wounding of a passenger." Warsaw Convention art. 17. The plain meaning of the text suggests that the carrier bears liability for the damages suffered by its passengers; a

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[25] The district court concluded that, because Florida's apportionment statute does not apply to this case, the court did not need to address conflict-of-laws issues related to the application of a state apportionment statute. We reach the same conclusion on appeal.

contrary interpretation that the carrier is liable for damage *for which it alone is responsible*, or for damage *caused by no other tortfeasor*, inserts words and inferences into the text when it is not clear that such additions are intended.

An examination of the surrounding provisions supports this interpretation. Article 21, for example, adopts a comparative liability standard if actions taken by the injured passenger caused or contributed to the passenger's damages. Warsaw Convention art. 21. Article 20 provides that the carrier is absolved from liability if it can prove that it took "all necessary measures" to avoid the damage. *Id.* art. 20. These provisions suggest that the drafters expressly contemplated when a carrier's liability should be reduced based on the conduct of others; if the drafters intended to reduce further the carrier's liability based on the conduct of other tortfeasors, they would have added such a provision.

Our conclusion is not altered by the Supreme Court's holding in *Zicherman*. In that case, the Court concluded that, because Article 17 uses only the term "damage," the issue of compensation for one's injuries is unresolved by the Convention and is governed by the law of the forum jurisdiction. *See Zicherman*, 516 U.S. at 229, 116 S. Ct. at 636. The Court restated this position in *Tsui Yuan Tseng*, observing that "[the] Warsaw drafters intended to resolve whether there is liability, but to leave to domestic law (the local law identified by the forum under its choice of law rules or approaches) determination of the compensatory damages available to the suitor." — U.S. at —, 119 S. Ct. at 672. The comparative fault regime urged by American goes beyond the issue of the amount of damages available to the suitor; it acts to limit the *liability*, or fault, of the air carrier. *See* Fla. Stat. Ann. § 768.81(3) ("the court shall enter judgment against each party liable on the basis of such party's percentage of fault"). Under this system, if a defendant and a nonparty each are found to be fifty percent at fault for a plaintiff's injury, the defendant is liable only for fifty percent of the plaintiffs damages. *See Fabre v. Marin*, *623 So.2d 1182, 1187* (Fla. 1993), *receded from on other*

grounds, Wells v. Tallahassee Mem. Reg'l Med. Ctr., Inc., 659 So.2d 249 (Fla. 1995). Application of Florida's comparative fault regime thus would intrude upon the determination of an air carrier's liability for a passenger injuries, which the Supreme Court recognized is governed exclusively by the terms of the Convention.[26]

Our decision will not require American to pay more damages than the amount for which it is responsible. Florida, like most other jurisdictions, has recognized a right of contribution on behalf of a tortfeasor who pays for the wrongdoings of additional tortfeasors. *See* Fla. Stat. Ann. § 768.31 (1997); *see also* Restatement (Second) of Torts § 886A (1982 App.) (noting that, by 1982, eighty percent of states had recognized right of contribution). American thus is able to pursue a separate cause of action, independent of the Warsaw Convention, against other potential tortfeasors that contributed to the passenger's injuries. *See West Am. Ins. Co. v. Best Prods. Co.*, 541 So.2d 1302, 1304 (Fla. Ct. App. 1989) (a cause of action for contribution against a joint tortfeasor exists by virtue of a right and remedy created by statute); *cf.* Restatement (Second) of Torts § 886A(2) (1977) (right of contribution arises after one tortfeasor has discharged more than his equitable share of common liability). Indeed, American has filed precisely such an action related to the crash of Flight 965.

For these reasons, we conclude that the district court correctly rejected American's request to apportion liability according to Florida law.

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[26] American cites *In re Crash Disaster Near Cerritos, California, on August 31. 1986*, 982 F.2d 1271 (9th Cir. 1992), to support its argument that liability has been apportioned in a Warsaw Convention context before. We note that the procedural context in which the *Cerritos* court apportioned liability is far from clear in the opinion. At any rate, the issue of whether liability may be apportioned under the Warsaw Convention was not before the *Cerritos* court, and we therefore do not find the case to be persuasive authority on this issue.

V. ADMISSION OF FACTS SURROUNDING CRASH DURING DAMAGES TRIAL

Piamba Cortes has filed a cross-appeal in which she argues that the district court erred by preventing any reference during the trial on damages to the factual circumstances surrounding the crash. Piamba Cortes claims these facts are relevant to the determination of compensatory damages for mental pain and suffering. Moreover, Piamba Cortes contends that, for the same reason, the jury should have been informed of the legal determination that the pilots of Flight 965 engaged in willful misconduct resulting in the crash.

The district court held that "[c]ounsel will not be permitted to make any reference in voir dire, opening statements, testimony, or closing argument to . . . [the court's] finding of willful misconduct against American." SR-602-4. The district court later clarified its ruling during the following colloquy with counsel:

> THE COURT: Counsel will not be permitted to make any reference during the course of the trial in opening statement or otherwise to the finding . . . of willful misconduct against American Airlines. You may tell them, as the Court will tell them, that the issue of liability has been settled, the only issue in this matter is the matter of damages. . . .
>
> . . . .
>
> MR. PARKS: You have no problem, as I understand it, though, of us giving a brief overview, that the airplane crashed, without going into the facts of the case?
>
> THE COURT: Without going into the facts. I am going to tell them the airplane crashed when I begin my voir dire.
>
> MR. PARKS: Yes, sir.
>
> THE COURT: But, in any event, no details about conduct, all right?

> MR. PARKS: I understand that. And we do object to it but thank you.

SR-7-9-10.

We review a district court's ruling on the admissibility of evidence for abuse of discretion, and evidentiary rulings will be overturned only if the moving party establishes that the ruling resulted in a "substantial prejudicial effect." *Judge v. Rodman,* 105 F.3d 1339, 1341 (11th Cir. 1997). When applying an abuse of discretion standard, "we must affirm unless we at least determine that the district court has made a 'clear error of judgment,' or has applied an incorrect legal standard." *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (citation omitted).

The admissibility of evidence in a federal action is governed by the Federal Rules of Evidence, not state law. *See Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997). Nonetheless, state law may assist in defining what evidence is material to an issue, and we previously have relied upon Florida authority when identifying evidence that is material to a determination of damages under Florida's wrongful death statute. *See Hiatt v. United States,* 910 F.2d 737, 743 (11th Cir. 1990). In light of the absence of federal law on this issue, we will look to Florida law for guidance.[27]

Florida law provides that, when computing damages for pain and suffering endured by a *plaintiff,* "[i]n most instances . . . evidence describing the details of an accident is logically relevant and admissible, even where liability has been admitted, to place the extent of injuries suffered by the plaintiff, as well as the degree of pain endured, in the proper context." *White v. Westlund,* 624 So.2d 1148, 1152 (Fla. Ct. App. 1993). The admissibility of such evidence in a wrongful death action

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[27] At any rate, Florida evidence law governing the relevance of and prejudice created by evidence is essentially the same as the Federal Rules of Evidence. *See Brown v. State*, 719 So.2d 882, 887 (Fla. 1998) (observing that § 90.403 of Florida's Evidence Code, which governs the admissibility of evidence when it presents the risk of prejudicing a party, "is in essence a restatement of Federal Rule [of Evidence] 403").

brought by a *survivor* of the decedent is not as clear. Damages for such mental pain and suffering, among other things, "must bear some reasonable relation to the facts" of the case. *See Florida Dairies Co. v. Roaers,* 161 So. 85, 88 (Fla. 1935) (petition for re-hearing). On at least one occasion a court has admitted evidence depicting an accident scene to establish the survivor's damages for mental pain and suffering, although the court also excluded a graphic photo of the decedent because its probative value was outweighed by the danger of unfair prejudice. *See Johnson v. Florida Farm Bureau Cas. Ins. Co.*, 542 So.2d 367, 370 (Fla. Ct. App. 1988). Given this law, American posits, and we agree, that Florida law may permit the introduction of facts underlying a fatal accident to establish a survivor's pain and suffering but does not require that such evidence be admitted under all circumstances. *Cf. White,* 624 So.2d at 1152 (facts underlying accident usually are relevant, but "the extent of information that may be received in evidence will vary depending upon the circumstances of each case").

In this case, the district court excluded not only any reference to the legal finding that the pilots of Flight 965 engaged in willful misconduct prior to the crash, but also any evidence relating to the facts of the crash. Although it appears that the evidence relating to the facts of the crash may have been admissible under Florida law, we cannot conclude that the district court's decision to exclude this evidence constitutes an unreasonable balancing of the probative value of this evidence with its potential for undue prejudice. As for Piamba Cortes' request to inform the jury of the legal finding of willful misconduct, this action undoubtedly would have unduly prejudiced American when compared to the value of this information in determining compensatory damages. Consequently, the district court did not abuse its discretion in excluding the evidence.

VI. CONCLUSION

For the reasons set forth in this opinion, we VACATE IN PART the district court's entry of summary judgment on the issue of American's liability, and REMAND the case for further proceedings consistent with this opinion. We AFFIRM the district court's determination that Florida compensatory damages law governs Piamba Cortes' claims, that Florida's comparative fault statute is not applicable to this case, and that evidence relating to the facts of the crash may be excluded during a trial to determine Piamba Cortes' compensatory damages.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 96-MD-1125
Oct. 10, 1997

IN RE AIR CRASH NEAR CALI, COLOMBIA
ON DECEMBER 20, 1995

AMENDED ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT ON LIABILITY

THIS CAUSE comes before the Court upon the PSC's motion for partial summary judgment as to the issue of liability in the passenger cases, filed July 14, 1997, and the cabin crew Plaintiffs' separate motion for summary judgment as to liability, filed July 14, 1997. With their motion, the passengers seek entry of an Order finding Defendant American Airlines, Inc. ("American" or the "Defendant") liable for compensatory damages flowing from the crash of American Airlines Flight 965 on December 20, 1995 in the mountains near Cali, Colombia. The passengers also ask the Court to find that their compensatory damages are not capped by certain provisions of the Warsaw Convention, which limit an air carrier's liability except in cases of "willful misconduct." The cabin crew members, whose lawsuits do not implicate the Convention, seek entry of an Order finding American liable for negligence under Florida law.

The Plaintiffs' motions are ripe for resolution, and this Court took extensive argument on them during pre-trial hearings on August 18, 19, 20 and 25, 1997. After an exhaustive

review of the parties' submissions, which include lengthy memoranda and voluminous exhibits, the Court concludes that the Plaintiffs are entitled to the relief that they seek. Simply put, no reasonable jury could find that acts of the pilots of Flight 965—and in particular the pilots' decision to continue their descent at night from a grievously off course position in mountainous terrain—amounted to anything less than willful misconduct, whether that term is construed to require an objective or a subjective inquiry. Moreover, no reasonable juror could find that the pilots' conduct was not among the proximate causes of the crash. We reach this conclusion with considerable hesitance, mindful of the significance of the litigation and the heavy burden that must be met before summary judgment may be entered in a Warsaw Convention case. Nevertheless, even giving the Defendant every benefit of the doubt, and drawing every reasonable inference in its favor, the record cannot fairly be read to support any other result. Accordingly, for the reasons detailed at length below, the pending motions for summary judgment must be, and are, GRANTED in their entirety.

I.

As noted above, this litigation arises out of the tragic crash of American Airlines Flight 965 on the evening of December 20, 1995 as the plane attempted to navigate its arrival to the Alfonso Bonilla Aragon airport at Cali. One hundred fifty-one passengers and the six members of the cabin crew died as a result of the crash, with another four suffering non-fatal injuries. The two cockpit pilots, Captain Nicholas Tafuri and First Officer Donnie Ray Williams, also perished in the crash. The initial lawsuit was filed on December 29, 1995. Since then, almost 160 additional cases have been consolidated before this division of the Southern District of Florida, including a number of lawsuits that were filed in other federal judicial districts, but subsequently transferred here by the Judicial Panel on Multidistrict Litigation. A nine-member

steering committee (the "PSC") represents the Plaintiffs in these consolidated cases with respect to liability issues. The Defendants are American Airlines, Inc., the estates of the two pilots and, in the six cabin crew cases, American's parent corporation, AMR.[1] Honeywell, Inc., the manufacturer of the flight management computer ("FMC") used by the pilots of Flight 965, and Jeppesen-Sanderson, Inc. ("Jeppesen"), the manufacturer of certain materials used in conjunction with the FMC, have been impleaded by American in several recently-filed cases, although the Court has denied American's motion to join these third parties in the other consolidated lawsuits.

The parties agree that the claims of the passenger Plaintiffs arise under what is commonly labeled the Warsaw Convention, an international treaty binding on the United States that, by its terms, applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." *See* 49 Stat. 3000, *reprinted at* 49 U.S.C. § 40105. Article 17 of the Convention, in the official English translation, states that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." At the time of this accident, Article 22, as modified, limited American Airlines' potential liability for compensatory damages flowing from the death or personal injury of the passengers on Flight 965 to $75,000 per victim. Article 25, however, created an important caveat to this language by explaining that "[t]he carrier shall not be entitled to avail

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[1] On August 25, 1997, the Court granted AMR's motion for summary judgment in these cases. The reasons underlying this ruling are summarized in a separate Order. During the pre-trial conference, the PSC indicated that the pilots' estates eventually will be dismissed as Defendants in most, if not all, of the consolidated lawsuits. The summary judgment motions filed by the passengers and the crew do not seek this relief against the estates.

[it]self of the provisions of this convention which exclude or limit [its] liability, if the damage is caused by [its] willful misconduct."

The PSC contends that many acts by the pilots of Flight 965 deviated so markedly from the standard of care, in the face of so plain and obvious a danger, that a finding of willful misconduct is inevitable. The Plaintiffs allege a large number of subsidiary errors by the pilots, including flying the plane at an excessive speed and leaving the speed brakes on while attempting an abrupt ascent shortly before colliding with the mountain, but focus primarily on four discrete acts. First, and principally, the Plaintiffs assert that the pilots violated American Airlines policy and Federal Aviation Regulations ("FAR's") by knowingly permitting Flight 965 to descend after the plane veered far off the prescribed approach path to the Cali airport. Second, the Plaintiffs contend that the pilots violated American Airlines policy by knowingly deviating from the flight plan and attempting a "short cut" into the airport. Third, the Plaintiffs allege that the pilots violated American Airlines policy by failing to verify that the identifier for a waypoint on the route they elected to fly was correct before entering it in the FMC. Finally, the Plaintiffs insist that the pilots, once off course, violated American Airlines policy by ignoring the instructions of the Colombian air traffic controller ("ATC") and attempting to bypass one of the required waypoints. The PSC suggests that these acts, standing alone or in the aggregate, demonstrate willful misconduct within the meaning of the Convention.

American does not deny that the pilots made what it calls "human mistakes." Def. Resp., at 3. Indeed, it squarely acknowledges at least two breaches of the applicable standard of care and concedes that the accident was "an avoidable controlled flight into terrain." Pre-Trial Stipulation, August 13, 1997 ("PTS"), at § V ¶ 20. The Defendant maintains, however, that a reasonable jury could find that the acts of the pilots did not, individually or in the aggregate, amount to willful misconduct. Moreover, according to American, even if the pilots

did commit wrongful acts, a reasonable jury could find that these acts did not proximately cause the crash of Flight 965. Rather, the wrongful acts of Jeppesen, Honeywell and the Colombian ATC's superseded any misconduct by the pilots. On the strength of these arguments, American contends that it is not liable to the crew members on a theory of negligence, and the $75,000 limitation on damages in the passenger cases should remain in place.[2]

II.

We begin by laying out the undisputed, material facts of this litigation, pausing occasionally to identify some of the parties' points of disagreement. Although many of these facts will be repeated and discussed in greater detail at subsequent points in this Order, it is helpful to provide an initial overview of the acts and omissions that both parties acknowledge took place on the night of the accident. Unless otherwise noted, the following facts have been proposed, stipulated to or left uncontested by American Airlines.

Flight 965 left Miami International Airport on the afternoon of December 20, 1995, bound for Cali, Colombia to the south. The aircraft pushed back from the departure gate 34 minutes late, and experienced an additional ground delay of one hour and 21 minutes before departing. PTS, at § V ¶4. The airplane used was a Boeing 757 which the parties acknowledge was airworthy and in good mechanical and structural condition when it left Miami. *Id.* at ¶30. In the cockpit were Captain Tafuri, the pilot, and First Officer Williams, the co-pilot. *Id.* at ¶31. Both Tafuri and Williams were Federal Aviation Administration ("FAA") licensed pilots, each with over 2200 total flight hours in Boeing 757's or 767's and extensive experience with American Airlines. *Id.* at ¶¶5-11, 15-16. Tafuri

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[2] It is unclear whether American opposes the entry of summary judgment in the passenger cases on the narrow question of its liability for compensatory damages under Article 17 (as opposed to the question of whether those damages should be limited by Article 25).

had flown 13 American Airlines flights as Captain to Cali prior to December 20, 1995, and indeed, an American supervisor carried out Tafuri's annual international line check on December 9, 1995—just eleven days before the accident—on a flight from Miami to Cali. *Id.* at ¶¶ 14, 42. Williams had never flown an American Airlines aircraft into Cali prior to December 20th. *Id.* at ¶ 41. At all material times during the flight, Williams was flying the aircraft and Tafuri was primarily handling radio communications. *Id.* at ¶ 44.

Prior to their departure, Tafuri and Williams were given a "dispatch package" which included a printed, computer-generated flight plan. The flight plan, among other things, called for Flight 965 to follow a specified route during the arrival and approach to the airport at Cali. The arrival phase is typically conducted in accordance with a specified STAR (Standard Terminal Arrival Route), which consists of a series of waypoints or "fixes" in the terminal area defining the path along which the aircraft must descend toward the airport. These waypoints are often radio beacons of various types known as navigation aids or "navaids." Navaids may consist of VOR's ("VHF Omnidirectional Range" stations) or NDB's (non-directional beacons), both of which emit radio waves that can be tuned in from the cockpit. By tuning radio receivers to the specified frequency for a VOR, for example, an aircraft's pilots can determine the compass direction to and in some instances the distance from the VOR in question. These navaids can help pilots establish their position in the sky as well as distances from point-to-point. Approaches, like arrivals, are typically defined in terms of a series of waypoints, and are intended to guide the aircraft from the arrival path onto the prescribed runway at the airport.

Flight 965 was equipped with a flight management computer. In an aircraft without an FMC, pilots fly by relying on "raw data"—specifically, the navigational information, such as magnetic compass heading, speed and altitude, that is displayed on dials and gauges on the instrument panel. The FMC, however, can be used to translate data received from

navaids into a map-like pictorial view of the aircraft's position in the sky. This view appears on electronic horizontal situation indicator ("EHSI") screens that are located opposite each pilot on the cockpit's main instrument panel. FMC inputs are made on a device known as a CDU, which resembles a calculator with a keypad and a small digital screen. Some or all of a pre-programmed flight plan, or the approach and arrival paths for particular airports, may be called up by the pilots from the computer's database simply by making certain keystrokes on the CDU. In other words, if a pilot elects to follow a particular STAR for an arrival, he need not type separately all of the waypoints that make up that STAR; instead, he may simply call-up the STAR by its identifier(s). Similarly, all of the waypoints along a desired approach path may be called up by typing the appropriate identifier. Once these steps are taken, the computer can be instructed to fly the aircraft automatically along the selected route (placing the plane in "L-Nav" mode). Alternatively, the pilots can simply use the EHSI screens for visual assistance while they manually fly the aircraft by relying on raw data.

In this case, we are concerned principally with four waypoints defining the arrival and approach to the Cali airport. These waypoints are, traveling north to south, the Tulua VOR (identified as "ULQ"), the fix known as "D21 CLO," the Rozo NDB and the Cali VOR (identified as "CLO"). The Cali VOR, located nine miles south of the airport, is the benchmark for the other waypoints. The Tulua VOR is located 43 miles to the north of the Cali VOR on a radial of 202°.[3] The D21 CLO waypoint is located 21 miles to the north of the Cali VOR on a radial of 193°. The Rozo NDB is located roughly 12 miles to the north of the Cali VOR, on or slightly offset from the same 193° radial. The strip of concrete on which Flight 965 was expected to land at the airport is known as Runway 1 when approached from the south and Runway 19 when approached from the north. The Cali airport is located

[3] 180° represents due north from the Cali VOR.

in a valley approximately 43 miles long and 12 miles wide and surrounded by high terrain. The arrival and approach paths for aircraft landing at the airport are designed to keep planes in an "airway" in the center of the valley.

American Airlines pilots flying into Central and South America must receive special training intended to acquaint them with the unique features of these regions. Among other things, pilots are trained to keep in mind two critical precepts when attempting to land airplanes in Latin America. First, they are instructed, in no uncertain terms, not to rely on local ATC's for information about their location or position in the sky. For example, the July, 1995 Pilot Reference Guide for Latin America, in a section titled "Warning! Arrivals May be Hazardous," makes the following points, all of which have powerful significance in this litigation:

> Controllers will clear you to descend below minimum safe altitude in mountainous terrain. . . . The controller will make assumptions that you must understand before you learn it the hard way. The controller assumes that:
>
> - You are on course;
> - You are where you say you are;
> - You know where the high terrain is;
> - You will *not accept* a clearance that will take you into the terrain.
>
> If you do accept the clearance, the controller will conclude that all of the above are true.

PSC Mot., exh. 8, at 62-63 (emphasis in original). The Guide goes on to emphasize that:

> If the airport is in high terrain, you are best advised to assume the controller will become distracted and allow you to fly into a mountain. It has happened.
>
> *Never rely on terminal controllers to keep you from hitting mountains! Do not trust them* . . . .

> Know exactly where you are and do not accept descent instructions unless you know it is safe to do so.

Id. at 63 (emphasis in original).

The second critical precept American Airlines pilots are trained to observe is a corollary of the first. Specifically, pilots are warned of the dangers associated with flying into Latin American airports, many of which, like that at Cali, are located at high altitudes amid rugged mountainous terrain. Consequently, it is literally, as the Guide makes clear in a section entitled "Staying Alive," a matter of life or death for pilots to ensure that they are absolutely certain where they are in the sky, and suspend any descent until they know where they are:

> There have been more major aircraft accidents in South America than anywhere else. There are good reasons for this. The most important factor, however, is you. You must know what is going on and where you are.
>
> . . .
>
> It seems obvious to say that you must know where you are at all times when operating in the southern divisions. The reason for saying this is to emphasize that you must be able to pinpoint your location on the enroute charts. If you are not used to flying with the charts out and open, then you must learn to do that down south because of the notes on the charts. These notes often define procedures you won't find anywhere else. . . .
>
> While knowing your enroute location can be critical, knowing where you are in the terminal area, around the dangerous high terrain airports of Central and South America, can be vital. Most of the aircraft that have hit the mountains did so because the crew apparently *did not* know where they were. The tolerances get finer and finer as you get into high mountains. For that reason, it is essential to monitor and rely upon raw data from ground-based Navaids, *whenever you descend from altitude.*

Id. at 63, 71-72 (emphasis in original) In a section titled "Terminal Procedures," the Guide continues, in a passage with significant implications here, that "[b]ecause of high terrain, it is imperative when operating in Central and South America that you *continually verify your exact location by every means available.*" *Id.* (emphasis added). In a section titled "Hazards," the Guide offers the following advice:

> There are few areas of the world that are as potentially dangerous to flight operations as Central and South America. The reasons include terrain, weather, ATC, runways, and communications, but by far the most dangerous element in this environment is a flight crew that lacks *situational awareness*. High mountains, bad weather, and possibly poor or missed communication, coupled with lack of planning, ignorance of the environment and procedures, or inattention, are the ingredients for disaster.
>
> It is not possible to over-emphasize, nor to repeat too often, the warnings and rules you will find in this chapter. If you fail to heed them, if you arrive in the terminal area listless after a long night of quiet tedium and fail to prepare for the approach, fail to rouse your energy and concentration, you and all the people in your charge may join the long list of wasted lives and wreckage that have littered the high slopes of the Andes.

Id. at 77 (emphasis in original). A section entitled "Knowing the Altitude of the Terrain Below" emphasizes that pilots, in order to be sure where they are, must rely on more than the EHSI map, and therefore must "[t]ake the time to study the several ways in which terrain elevation is depicted on the enroute charts and arrival/departure plates." *Id.* In short, pilots are required to *"[e]xamine the charts and plates to locate your position, cross-check every available indication and know where you are before you accept a descent."* *Id.* at 79-80 (emphasis added).

These precepts are summarized in a series of rules for pilots flying into Latin America. The rules appear under the heading "Situational Awareness: A Working Definition."

> Situational awareness implies an alert active assessment of the aircraft's position relative to terrain, other aircraft, and the airport. . . . [N]owhere is it more of a requirement than in the vicinity of the high terrain airports of Central and South America.
>
> The natural instinct to employ the rules that follow is the mark of a pilot who has situational awareness. Situational awareness may become second nature after years of experience and training, but it can also be acquired through personal discipline, motivation, and a willingness to learn from the mistakes of others. . . .
>
> The challenge to those who devise and present training to the American Airlines crews who will fly into Latin America has been to shatter the complacency that comes with years of experience flying in a predictable environment. With that in view we offer this warning in the form of a rule, when flying into Central and South America:
>
> > *Rule 1: You must take responsibility for your own survival!*
>
> In Latin America, the relationship between the ATC controller and the flight crew is different from that in the US. It is different in this way: US controllers have rigid guidelines for descent and vectoring clearance, separation standards, communications protocols, complete coordination between adjacent control functions, and superb equipment. They have a directive role which we have come to accept without question.
>
> In contrast, the attitude of the Central and South American controller is much less directive. This is a subtle but vital philosophical difference you must grasp, because it

can save your life. Controllers in Latin countries have a role that is more in the nature of a coordinator, negotiator, or facilitator than US controllers. In the US, we respond to the instructions of the controller with confidence that we will have terrain and traffic separation, that there is a clear plan for our sequence to the final approach. We request deviations as we think necessary, but normally not. We entrust ourselves to the person in front of the scope.

But the Latin American terminal controller may not even see you on a scope. If radar is available, high mountains between you and the destination airport may prevent contact. So when the controller issues a clearance for descent, it will normally be based upon the controller's *assumption* that you are taking charge of your own terrain separation. *The burden rests squarely upon you.*

Even the routing is really in your own hands. The controller is used to dealing with crews who have made hundreds of approaches into the area and know where every high point is. The controller, in an effort to expedite your approach (as a courtesy or sometimes to optimize sequencing), may clear you direct to a fix over high intervening terrain. A red flag should go up if you are given a clearance direct in terminal areas with high terrain. You should accept an abbreviated procedure *only* if you really know where you are, and what's below you, it's VFR [visual flight rules, as opposed to instrument flight rules ("IFR"), which Flight 965 was following], and the sun is shining. Whenever this is not the case, follow this next rule:

> *Rule 2: Insist on the complete published approach/ departure, unless you know exactly where you are and what's below you!*

Is it really possible that a controller will issue a descent to an altitude below the MEA [minimum enroute alti-

tude], AMA [area minimum altitude], MORA [minimum off-route altitude], or MSA [minimum safe altitude]? Yes, it is done routinely. If you'll examine some of the approaches into airports surrounded by high terrain, you will see that if you *don't* descend below these guideline altitudes, in some cases, you won't be able to make the approach. The trick is to remember the first rule: *You must take responsibility for your own survival!* That brings us to the next rule:

> ***Rule 3: Do not descend unless you know exactly where you are and the safe minimum altitude.***
>
> There are two parts to this rule: knowing where you are and knowing the safe minimum altitude. The two issues are entwined. You can determine terrain elevation below you only if you know where you are.

Id. at 77-79 (emphasis in original) (boldface added).

In a post-accident document that succinctly reiterates pre-accident training, the Defendant reminded its pilots of the following points:

- "[C]ontinually verify [your] exact position by every means available [when flying in Latin America]"
- "Assume nothing. When clearances are received, check the MEA prior to descending. Always have an enroute chart open to the correct area being flown."
- *"Know where you are; know where you are going; and know how to get there."*
- "You will be operating in an antiquated ATC environment, with usually little or no radar contact (Circa 1940's). You are the Captain, with much more responsibility than at any time in your career. Remember, it's your license and your life. Guard both!"

- "Constant Awareness of Position. The only safe place to descend below the MEA, MOCA [minimum obstruction clearance altitude], etc. is in a published holding pattern. You must use it to assure adequate terrain clearance at or above the MEA."
- "Do not request or accept direct clearances which result in off-airway flying."
- "You must know the MEA versus your present position."
- "Terminal Area Charts [ ] depict holding patterns along published routes that must be used for any unplanned maneuvering in the terminal area. They must be flown exactly as depicted."
- "Prior study [of arrivals and approach charts] is essential. You cannot wait until you get there."
- "Be aware of the MEA at all points on the approach and missed approach."
- "The Captain [must] thoroughly brief each departure, arrival and landing, regardless of weather, with particular attention to obstacle clearance and terrain. Appropriate area charts depicting terrain and approach charts will be used in this briefing during the approach."
- "It is totally the pilot's responsibility to avoid terrain."
- *"If there is any question as to position, do not descend."*

Id. exh. 17 (emphasis added).[4] There is no dispute that Tafuri and Williams knew about, and had been trained to observe in

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[4] This document was prepared two months after the accident. American does not dispute that most of the provisos contained in it were taught to pilots prior to December, 1995. *See* PSC Mot., exh. 18, Rauhofer dep., at 74-82. The Defendant contends, however, that it is

most if not all situations, these principles, which undoubtedly make the mistakes that occurred during the final minutes of Flight 965 more patent, and far more egregious, than they might otherwise be.

A great deal of our understanding of what unfolded during the final minutes of Flight 965 is based on the cockpit voice recorder ("CVR"), which recorded the interchange of remarks among Tafuri, Williams and the Colombian ATC's. The summary judgment record contains two transcriptions of the CVR. One version, quoted by the PSC in its motion, apparently is based on the work of an investigatory group of the National Transportation Safety Board ("NTSB") and was adopted by American in its May 31, 1996 NTSB submission. Recently, American Airlines retained an expert, Michael McDermott, to prepare a second transcript which reflects, at some critical points, a different interpretation of what was said. For purposes of this Order, we will, unless otherwise noted, use the "second" American Airlines transcript, although the differences between the first and second transcripts are generally of little moment and, where differences exist, they are not easy to square with words actually recorded on the tape played

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unclear whether, prior to the accident, pilots were instructed to "continually verify their exact position by every means available" and never descend "[i]f there is any question as to position," since there is no deposition testimony precisely conceding these points. But whether or not American Airlines pilots were instructed to verify their position "by every means available" (and according to the July, 1995 Latin American Pilot Reference Guide quoted above, they were), it cannot be disputed that pilots were trained to take whatever steps are necessary to know precisely where they are as they descend. Moreover, even assuming that American pilots were trained prior to December, 1995 that they could descend in certain situations even if there was a "question" about position (an assumption largely unsubstantiated by the record, and contrary to one of the "Rules to Live By" in the Pilot Reference Guide—"Do not descend unless you know exactly where you are . . ."), plainly no one disputes that the training received by Tafuri and Williams forbade descending an aircraft from a position as far off-course as that of Flight 965.

before and submitted to this Court.[5] The other principal source of information about Flight 965 is the digital flight data recorder ("DFDR"), from which we can discern, among other things, the heading and altitude of the aircraft during the descent. *See id.*, exh. 2.

What follows is an initial survey of the CVR transcript, which we present largely to provide some of the background for our analysis of what the Court sees as the critical issue in the lawsuit: did the pilots know, or was it so plain they must have known, that Flight 965 was out of the valley and off the published route while the aircraft was descending toward the dangerous terrain below? Originally, Flight 965 was expected to follow an arrival path that called for it pass over the Tulua VOR and continue south to the Cali VOR, and at that point turn completely around for the approach to Runway 1. The applicable charts generally provide that an incoming aircraft should be no lower than 15,000 feet above mean sea level ("MSL") at Tulua, 5000 feet at the D21 waypoint and 3900 feet at Rozo.[6] The airport itself is located approximately 3100 feet above MSL. The initial conversation excerpted here records the final communication between the pilots and the Colombian ATC stationed in Bogota. This communication took place with the aircraft about to commence the crucial stages of its arrival to the Cali airport. Over the prior seven minutes, the aircraft had descended from its cruising altitude of 37,000 feet to approximately 25,000 feet above MSL.

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[5] The transcript appears as exhibit one to the Defendant's Response. In the transcript, all of the comments of the pilots and the ATC's appear in capital letters. In those instances where we have quoted the transcript, we have attempted to employ standard rules of capitalization, but have retained the punctuation (or lack thereof) indicated in the exhibit.

[6] Most American Airlines witnesses have acknowledged that the MEA for Tulua is 15,000 feet, *see, e.g., id.*, exh. 34, Daigle dep., at 214, 227-28, although Jeff Noe testified that the "minimum altitude" is 10,000 feet. *Id.* exh. 21, at 142.

21:33:50 Tafuri	[A]merican Nine Six Five, request lower [altitude clearance]
21:33:53 ATC (Bogota)	American Nine Six Five, can do[,] now descend to flight level two zero zero, report leaving two four zero
21:33:59 Tafuri	We're leaving two four zero now and descending to two zero zero [. . .]
21:34:04 ATC	And then call Cali [ATC, on] frequency one one niner decimal one, buenos noches
21:34:07 Tafuri	Please say the frequency again
21:34:09 ATC	One one niner decimal one
21:34:13 Tafuri	One one niner decimal one uh, feliz navidad senorita
21:34:16 ATC	Muchas gracia, la mismo
21:34:19 Tafuri	Gracias
21:34:22 Tafuri	Center, American Nine Six Five leaving flight level two four zero, descending to two zero zero, buenos tardes

From this point forward, the pilots communicated with the ATC in Cali. The aircraft was, at this time, just over 63 miles from the Cali VOR, flying at roughly 320 knots on a heading of approximately 190°. In the course of the conversation excerpted below, the ATC cleared Flight 965 to the Cali VOR,

instructed the pilots to "descend and maintain [15,000] feet" and told them to "report uh, Tulua VOR." Tafuri acknowledged these directions, including the duty to "report Tulua," but remarked that he understood the flight to be "cleared *direct* to Cali VOR" (emphasis added). After the ATC responded by saying "Affirmative," Tafuri programmed the FMC to fly the aircraft directly to Cali:

21:34:37	
Williams	Nineteen one or
21:34:39	
Tafuri	That's Cali
21:34:40	
Tafuri	Cali approach, American Nine Six Five
21:34:41	
Williams	Yeah
21:34:44	
ATC (Cali)	American Niner Six Five, good evening, go ahead
21:34:47	
Tafuri	Uh, buenos nochas senor, American Nine Six Five leaving two three zero, descending to two zero zero, go ahead sir
21:34:55	
ATC	What your distance DME from Cali?[7]
21:34:57	
Tafuri	The DME is six three
21:34:57	
ATC	Roger, is cleared to Cali VOR uh, descend and maintain one five thousand feet, altimeter three zero zero two

[7] DME, in this context, refers to the distance from the aircraft to the Cali VOR.

21:35:09
Tafuri One five

21:35:09
ATC No delay expect for approach, report uh, Tulua VOR

21:35:14
Tafuri Okay, understood cleared direct to Cali VOR uh, report Tulua and uh, that altitude one five, that's fifteen thousand, three zero zero two, is that all correct sir?

21:35:25
ATC Affirmative

21:35:27
Tafuri Thank you

21:35:28
Tafuri I put direct Cali for ya in there

21:35:29
Williams Okay, thank you

21:35:44
Williams Two fifty below ten here?

21:35:47
Tafuri Yeah

It is American's view that the ATC, by answering "Affirmative" after Captain Tafuri remarked "cleared direct to Cali VOR," authorized Flight 965 to fly to the Cali VOR without having to follow the published route (which included, among other things, passing over Tulua). The PSC makes two points in response. It contends that ATC's in Latin America used the word "direct" to mean direct along the published route, and that Tafuri and Williams were trained to know this fact. The Plaintiffs also observe that the pilots' apparent belief that the aircraft was allowed to ignore the published route was wholly

at odds with the instruction (acknowledged by Tafuri) to report at Tulua. These arguments may have merit.[8]

For our purposes, though, it is enough simply to acknowledge this dispute, since the pilots' route was clarified moments later after an additional exchange with the ATC:

21:36:20	
Tafuri	And flight attendants please prepare for landing, thank you [on public address channel]
21:36:24	
Tafuri	I sat 'em down and
21:36:27	
ATC	Niner Six Five, Cali
21:36:28	
Tafuri	Nine [on public address channel]

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[8] The PSC identifies the decision to program the FMC to fly directly to Cali as one of the acts supporting a finding of willful misconduct. Drawing every inference in favor of American, however, there may remain a jury triable issue on this point. There may, for example, be some dispute about whether American Airlines pilots were trained about this disparity in the use of the term "direct" prior to December, 1995. The PSC relies principally on a post-accident bulletin squarely highlighting the issue. PSC Mot., exh. 19, at 1 ("Controllers frequently use the term 'cleared direct' when they mean 'cleared via flight plan route.' Likewise when a flight is cleared 'TO' a VOR or fix as a clearance limit, it does not mean that a flight is cleared direct to that fix."). The Defendant counters by pinpointing deposition testimony to the effect that American was unaware of the disparity until the accident at issue in this case. Jeff Noe, however, testified that he would have expected Tafuri and Williams to be aware of the problem "based on the training they would have received." *Id.*, exh. 21, at 153-54. Noe also conceded that he was aware of the issue prior to December 20, 1995, and described the language in the post-accident bulletin as basically placing a "higher emphasis" on the matter. *Id.* at 153-55. Rauhofer likewise acknowledged that he was aware of the problem prior to December, 1995, and that he believed the bulletin was basically a "reiteration of information" he had learned throughout this piloting career at American. *Id.*, exh. 18, at 84-85.

21:36:29	
Tafuri	Niner Six Five, go ahead please
21:36:31	
ATC	Kay sir, the wind is calm, are you able to approach Runway One Niner?
21:36:36	
Tafuri	Would you like to shoot the One Nine straight in?
21:36:38	
Williams	Uh, yeah, we'll have to scramble to get down, we can do it
21:36:40	
Tafuri	Uh, yes sir, we need lower altitude right away though
21:36:43	
ATC	Roger, Nine Six Five is cleared to VOR DME approach to Runway One Niner, Rozo Number One arrival, report Tulua VOR
21:36:52	
Tafuri	Cleared the VOR DME to One Nine, Rozo One uh, arrival, we'll report the VOR, thank you sir
21:36:58	
ATC	Report uh, Tulua VOR
21:37:01	
Tafuri	Report Tulua

There is no dispute that the ATC offered, and the pilots accepted, an arrival and approach path that called for Flight 965 to follow the Rozo 1 STAR and the VOR DME Rny 19 approach.[9] The Rozo 1 STAR begins at the Tulua VOR and

[9] The Plaintiffs cite the pilots' "hasty" acceptance of the runway change as another example of willful misconduct. They contend that the pilots accepted the change in approximately six seconds without making

ends at the Rozo NDB; the VOR DME Rny 19 approach route largely, if not entirely, complements and extends the Rozo 1 STAR. What ensued, however, was at least initial confusion in the cockpit concerning just where the pilots were supposed to be flying. First Officer Williams seems to have been under the misconception that the Rozo 1 STAR began at the Rozo NDB instead of Tulua; Captain Tafuri, however, indicated to him (presumably by referring to the published charts) that the Rozo NDB could be reached only after the aircraft touched Tulua. It is at this point that Tafuri asked the ATC for permission to go "direct to Rozo," a remark that set in motion a chain of events that culminated in the crash:

21:37:03	
Tafuri	I'm gonna give you to Tulua first of all, you, you wanna go right to Ca, uh, to Tulua?
21:37:08	
Williams	Uh, I thought he said the Rozo One arrival though
21:37:10	
Tafuri	Yeah, he did, we have time to pull it out
21:37:12	
Tafuri	And
21:37:17	
Tafuri	Rozo

any effort to examine the charts to determine if the aircraft could safely make the landing, a particularly egregious mistake since neither of the pilots had ever landed on runway 19 and Williams admitted that they would have to "scramble to get down." American acknowledges that the flight crew was "obligated to reject the change . . . if they determined that they did not have the information available or necessary to properly execute the runway 19 approach." PTS, at § V ¶ 59. Moreover, American policy requires pilots to conduct a full briefing of certain navigational aids before initiating an approach. *See* PSC Mot., exh 22. According to the Defendant, however, there is no requirement that this briefing take place before a new approach path is accepted, as opposed to initiated. Once again, for present purposes, we will construe the record in the light most favorable to American.

21:37:20
Tafuri There it is

21:37:25
Tafuri Yeah, see that comes off Tulua

21:37:27
Williams Okay

21:37:29
Tafuri Uh, can, American Airlines uh, Nine Six Five go direct to Rozo and then do the Rozo arrival sir?

21:37:36
ATC Affirmative, take the Rozo One and Runway One Niner, the wind is calm

21:37:42
Tafuri Alright, Rozo, the Rozo One to One Nine, thank you, American Nine Six Five

21:37:46
ATC Affirmative, report Tulua on uh, twenty-one uh, miles uh, five thousand feet

21:37:53
Tafuri Okay, report Tulua at twenty-one miles and five thousand feet, American Nine uh, Six Five

21:37:59
Williams Okay, so we're cleared down to five now?

21:38:01
Tafuri That's right

21:38:02
Tafuri And

21:38:08
Tafuri Off Rozo, which I'll tune here

As noted below, there is a substantial dispute about whether Tafuri meant what he plainly said: "can [Flight 965] go direct to Rozo . . . ?" The PSC asserts that Tafuri, having observed on the charts that flying directly to Rozo would allow the aircraft to follow a straighter path to the runway than would be the case if the aircraft had to make the slight "detour" required to pass over Tulua, knowingly sought permission to follow a "short cut" to the airport. Moreover, says the PSC, the ATC did not authorize this maneuver; rather, the ATC construed Tafuri's reference to "direct" to mean direct along the applicable published route, and for this reason reminded the crew to "take the Rozo One and Runway [19]" path, and specifically instructed them again to "report Tulua." *See supra* note 8. American takes the position that Tafuri *meant* to ask "can [Flight 965] go direct to [Tulua] . . . ?" as prescribed by the published route. In any event, it was during this exchange that one of the pilots sought to program the FMC to fly automatically to the Rozo NDB by typing the letter "R," which he apparently thought was the identifier for Rozo, into the CPU keypad.[10] A total of twelve waypoints appeared on the screen of the CPU; the first of these was a beacon known as Romeo, located approximately 132 miles to the northeast of the aircraft's position. It was the identifier for this waypoint that the pilot executed, sending the aircraft on

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[10] The PSC suggests, although does not emphasize, that the pilots should have known that the identifier for the Rozo NDB was "R-o-z-o" not "R," since American Airlines pilots were taught that non-directional beacons associated with approaches are known by their published name, and Rozo was listed as "R-o-z-o" in the written flight plan. PSC Mot., exh. 9, at 28; exh. 10, at 3. The Defendant counters that three critical Jeppesen charts—the Runway 1 approach plate, the Runway 19 approach plate and the Rozo 1 Arrival plate—showed the identifier for Rozo as "R." The Defendant also denies the PSC's suggestion that its pilots were taught to call up Rozo by reference to its full name. As discussed below, it is American's position that, if anyone is at fault for the pilots' use of "R" for Rozo, it was Jeppesen and Honeywell, although American does concede that the pilots breached the standard of care by failing to verify whether "R" was in fact the identifier for Rozo before executing this command.

a prolonged, and pronounced, turn to the left, towards the east and the mountains. There is no dispute that the pilots were required to, but did not, verify that the chosen waypoint was actually Rozo.

Within seconds, instruments in the cockpit reflected a substantial turn to the left, since the FMC, unbeknownst to the pilots, had begun to fly the aircraft automatically in the direction of Romeo. Notably, when "R" was entered, the aircraft was *already* adjacent to or slightly to the southwest of Tulua.

21:38:26
Tafuri See where you get

21:38:27
Williams Yeah, we're gettin'

21:38:28
Tafuri At twenty-one miles and five thousand is part of the approach

21:38:30
Tafuri Okay?

21:38:31
Williams Okay

21:38:33
Tafuri Uh, off ULQ, so let me put ULQ in here, seventeen seven, cause I wanna be on raw data with ya

21:38:39
ATC Niner Six Five, distance now

21:38:42
Tafuri Uh, what did you want sir?

21:38:45
ATC Distance DME

21:38:46
Tafuri Okay, the DME is uh from Cali is uh, thirty-eight

The initial exchange in this excerpt is transcribed quite differently, and far more plausibly, in the original CVR transcript as "See what I get?" . . . "Yeah"—presumably in reference to Tafuri's attempt to tune the Rozo NDB on another navigational radio some 23 seconds earlier. The PSC suggests that, once Rozo was tuned, the radio's navigation needle would have been pointing toward the right rather than basically straight ahead, which is perfectly consistent with the aircraft's ongoing turn to the left and wholly inconsistent with the published route. In any event, it is undisputed that, by this point, Tafuri wished the aircraft to fly to Tulua:

21:38:49
Williams Uh, were we

21:38:49
ATC Roger

21:38:52
Williams We're going out to

21:38:54
Tafuri Let's go right O uh, Tulua first of all, okay?

21:38:58
Williams Yeah, where are we headed now?

21:38:58
Tafuri Seventeen seven, ULQ uh, I don't know, what's this ULQ, what hap, what happened here?

21:39:04
Williams Manual heat

21:39:05
Tafuri Let's come to the right a little bit

21:39:06
Williams Yeah, he's wanting to know where we're headed

21:39:07
Tafuri ULQ, I'm gonna give you direct Tulua

21:39:10
Williams Okay

21:39:10
Tafuri Right now

21:39:11
Tafuri Okay you got it?

21:39:13
Williams Okay

21:39:14
Tafuri And

21:39:18
Tafuri It's on your map, should be

21:39:19
Williams Yeah that's a left uh, left turn to ULQ

21:39:22
Tafuri Yeah, I gotta identify that fucker though, I

21:39:25
Tafuri Okay I'm getting it, seventeen seven, it just doesn't look right on mine, I don't know why

21:39:30
Williams Left turn, so you wanna left turn back around to ULQ?

21:39:32
Tafuri No

21:39:33
Tafuri Hell no, let's press on to

21:39:35
Williams Well we're

21:39:36
Williams Press on to where though

21:39:37
Tafuri Tulua

21:39:39
Williams That's a right, no that

As discussed in more detail below, it was during this period that the pilots discontinued the left turn and initiated a turn back toward the right and the valley. By 21:39:39, the aircraft was south of Tulua, and well to the east of the valley and the 202° and 193° degree radials that define the Rozo 1 STAR. Of greater significance, the aircraft had continued its descent, and had dropped over 5000 feet since the "R" was entered into the FMC.

21:39:40
Tafuri Where're we going, one (twe)[partial word], come to the right, let's go to Cali first of all, let's, we got fucked up here didn't we?

21:39:45
Williams Yeah

21:39:46
Tafuri Go direct CLO

21:39:47
Williams Okay, oh

21:39:51
Tafuri How did we get fucked up here?

21:39:54
Tafuri Come to the right, right now, come to the right right now

21:39:55
Williams Yeah, we're, we're in a heading select to the right

21:39:58
Tafuri And

21:40:01
Tafuri And American uh, we're thirty-eight miles north of Cali and you want us to go to Tulua and then do the Rozo uh, to the uh Runway right, One One, One Nine?

21:40:11
ATC Kay the RO, you, you can land it, Runway One Niner, you can use Runway One Niner, what is your altitude and the DME from Cali?

21:40:21
Tafuri Okay, we're thirty-seven DME at ten thousand feet

The aircraft, during this period, is continuing to fly back toward the west, although it remains far from the valley and the published arrival and approach path. Although the PSC contends that Tafuri acted unconscionably by instructing Williams to "go direct [to Cali VOR]" without having first obtained permission from the ATC, the record suggests that the command was never actually executed in the FMC.

21:40:24
Tafuri You're okay, you're in good shape now

21:40:25
ATC Roger

21:40:26
Tafuri We're headin', headin' the right direction, you wanna

21:40:27
ATC Report at five thousand on a final to One One, Runway One Niner

21:40:29
Tafuri Oh shit, you wanna take the One Nine yet?

21:40:34
Tafuri Come to the right, come, come right to Ca, Cali for now, kay?

21:40:34
Williams Uh, yeah

21:40:37
Williams Okay

21:40:40
Tafuri It's that fuckin' Tulua I'm not getting for some reason

21:40:44
Tafuri See I can't get, okay now, no, Tulua's fucked up

21:40:48
Williams Okay, yeah

21:40:49
Tafuri But I can put it in the box if you want it

21:40:52
Williams No, I, I don't want Tulua, let's just go to the extended centerline of uh

21:40:55
Tafuri Which is Rozo

21:40:56
Williams Rozo

21:40:56
Tafuri Why don't you just go direct to Rozo then, alright, I'm gonna put that over ya

By this point, it seems clear that the pilots are uncertain about where to fly or at least in which direction the plane is headed. The PSC asserts that the decision to abandon Tulua and fly directly to the Cali VOR or Rozo, while perhaps an attractive shortcut at that point, was both legally impermissible and in

violation of American Airlines' policy. American, for its part, suggests that the ATC's comments at 21:40:11 gave the crew permission to bypass Tulua and simply proceed to maneuver for a landing on Runway 19. Consequently, says American, the pilots justifiably continued to fly to the west in order to intercept the 193° radial.

21:40:58
Williams Okay, let's get some altimeters, we're out of uh, ten now

21:41:01
Tafuri Alright, sa

21:41:02
ATC And Nine Six Five, altitude?

21:41: 05
Tafuri Nine Six Five, nine thousand feet

21:41:10
ATC Roger, distance now?

21:41:15 Terrain, terrain, whoop, whoop [sounds on cockpit microphone from aircraft's ground proximity warning system]

21:41:17
Tafuri Oh shit. Pull up baby

21:41:18 Whoop, whoop pull up, whoop, whoop, pull up

21:41:20
Williams It's okay

21:41:20
Tafuri Okay, easy does it, easy does it

21:41:23
Williams Help

21:41:23
Tafuri Up baby more, more

21:41:23	Whoop whoop
21:41:26	Pull up
21:41:26 Williams	Okay.
21:41:46 Tafuri	Up up up.
21:41:26	Whoop whoop pull up.
21:41:28	[Collision; end of recording]

When the crash occurred, the aircraft had dropped to approximately 8900 feet above mean sea level, and was still some 33 miles northeast of the Cali VOR and ten miles east of the airway. The aircraft hit close to the summit of El Deluvio, one of the peaks lining the east side of the valley. It was not until the initial terrain warning, though, that the pilots halted their descent and attempted to climb. There is conflicting evidence about the speed of the aircraft when the collision occurred. The Defendants assert that the plane never violated the FAR prohibiting air speeds in excess of 250 knots below 10,000 feet; the Plaintiffs disagree, but apparently base their position on the ground speed of the aircraft. The ability of the plane to ascend rapidly was hampered by the fact that the speed brakes, deployed several minutes earlier, had not been pulled back.

III.

The standard to be applied when reviewing summary judgment motions appears in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

> fact and that the moving party is entitled to a judgment as a matter of law.

As the Eleventh Circuit has explained:

> In assessing whether the movant has met [its] burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non-movant. If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.

Clemons v. Dougherty County, 684 F.2d 1365, 1368-69 (11th Cir. 1982) (citations omitted). In addition, the district court must view the record through the prism of the substantive evidentiary burden applicable to the particular cause of action before it. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

Nevertheless, to withstand a summary judgment motion, the nonmoving party must establish that, based on the evidence in the record, there can be more than one reasonable conclusion as to the proper verdict. *Id.* at 250. Consequently, "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (noting that "once the moving party has met [its] burden by presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial, [Rule] 56(e) shifts to the non-moving party the burden of presenting specific facts showing that such contradiction is possible"). Moreover, a response

that consists of conclusory allegations and unreasonable inferences is insufficient to withstand the motion. *See Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). In short, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 250-51; *see also Buckley v. Hospital Corp. of America, Inc.*, 758 F.2d 1525, 1527 (11th Cir. 1985) (noting that a motion for judgment as a matter of law should be granted unless there is " 'substantial evidence opposed to the motion[ ], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions' ") (quoting *Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*)). We measure the pending motions for summary judgment against these familiar standards.

Before proceeding further, we pause to address American's observation that the PSC has not identified any case where a court entered summary judgment in favor of the plaintiffs on a claim of willful misconduct under the Warsaw Convention. Our own research confirms the absence of any published ruling to this effect. However, contrary to American's sweeping suggestion that "the concept of willful misconduct defies determination as a matter of law," Def. Resp., at 2, there are instances where courts have granted judgment as a matter of law in favor of defendants in Warsaw Convention lawsuits where the evidence could not support a finding of willful misconduct. *See, e.g., Saba v. Compagnie Nationale Air France*, 78 F.3d 664 (D.C. Cir. 1996) (reversing district court's conclusion that air carrier acted with willful misconduct, and remanding with instructions that judgment be entered for the plaintiff subject to the liability limitations of the Convention). More to the point, the principles of Rule 56 apply to all lawsuits encompassed by the Federal Rules of Civil Procedure. There is no exception for Warsaw Convention proceedings, and nothing in the case law of this Circuit sustains the proposition that even if no reasonable juror could disagree that a defendant's employees engaged in willful misconduct, a

plaintiff nevertheless must be compelled to take his claims to trial.

Undeniably, there are broad pronouncements in some cases that, at first blush, can be read to support the Defendant's belief. *See, e.g., In re Hijacking of Pan Am World Airways, Inc. Aircraft at Karachi, etc.*, 713 F. Supp. 1483, 1483 (S.D.N.Y. 1989) (suggesting that, under the applicable Second Circuit law, "since an allegation of willful misconduct involves the state of mind of the defendant, that issue should normally be resolved by the trier of fact"). The most that can be said for these opinions, though, is that they turn on the assumption that willful misconduct may involve an inquiry into the state of mind of the defendant's employees, and that state of mind issues are especially difficult to resolve on summary judgment. But this is nothing more than a "general rule," *Chanel, Inc. v. Italian Activewear of Florida. Inc.*, 931 F.2d 1472, 1476 (11th Cir. 1991), and in this Circuit, as noted below, the willful misconduct inquiry is not entirely subjective. Moreover, even assuming that the term willful misconduct requires a subjective inquiry under all circumstances, there are many instances in the law where the evidence of state of mind is so unequivocal that summary judgment is proper and, indeed, expressly mandated by Rule 56. In employment discrimination litigation, for example, the Eleventh Circuit has remarked that "[a]s a general rule, summary judgment is not a proper vehicle for resolving [Title VII] claims . . . which often turn on an employer's motivation and intent." *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646 (11th Cir.), *reh'g denied*, 820 F.2d 1231 (1987). Yet courts often enter judgment as a matter of law in employment discrimination lawsuits that rest on circumstantial evidence if no reasonable juror could find that the defendant intended to discriminate against the plaintiff. *See, e.g., Combs v. Plantation Patterns*, 106 F.3d 1519, 1538-43 (11th Cir. 1997).

All that being said, it seems incomplete to describe the PSC's application as an "ordinary" summary judgment motion. We recognize that the motion has substantial impli-

cations for American Airlines as well as the roughly 160 individual Plaintiffs who have sued on behalf of the victims of Flight 965. For this reason, and given the lack of direct precedent for the ruling we make today, the Court has undertaken a painstaking scrutiny of the parties' submissions, and devoted the better part of four days to argument and close questioning on the issues of negligence, willful misconduct and causation. Summary judgment motions are never entered lightly, and this case is surely no exception. In the end, though, what makes this case unique, and so powerfully supports the entry of summary judgment in favor of the Plaintiffs, is not just the pervasiveness of the pilots' misconduct, but American Airlines, multiple, express *admissions* about this misconduct and its consequences under the applicable law. Even drawing all reasonable inferences in favor of American, and focusing only on the *most* egregious of a series of acts that, standing alone or in the aggregate, might also support summary judgment, there is only one fair result on this record, and nothing in Rule 56 permits a Court to abdicate its responsibility under these circumstances.

IV.

At the outset, it is vital to clarify precisely what "willful misconduct" signifies in the passenger cases.[11] The parties agree that the meaning of willful misconduct as used in the Warsaw convention remains a question of federal law. Our analysis begins with the Eleventh circuit's opinion in *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985). In *Butler*, the court addressed the defendant carrier's argument that the conduct of its crew did not amount to willful misconduct. The court disagreed, and offered the following comments:

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[11] The standard for negligence under Florida law, which controls the claims of the cabin crew Plaintiffs, is discussed at page 108 of this Order.

> The term 'willful misconduct' . . . has been interpreted in *Koninklijke Luchvaart Maatschappij N.V. v. Tuller*, 292 F.2d 775, 778-79 [(D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961)], by a panel of which retired [Supreme Court] Justice Reed and future Chief Justice Burger were members, as meaning 'the intentional performance of an act with [1] knowledge that the . . . act will probably result in injury or damage' *or* [2] 'reckless disregard of the consequences' *or* [3] 'a deliberate purpose not to discharge some duty necessary to safety.' "

Id. at 430 (emphasis and brackets supplied).[12] The first and third theories for proving willful misconduct plainly require the jury to consider the state of mind of the pilots, although the third theory requires a far more culpable mental state. The parties disagree about whether the phrase "reckless disregard of the consequences" also contemplates an inquiry into the pilots' state of mind. The PSC asserts that "reckless disregard" creates an objective standard that does not turn on whether the pilots actually perceived the likely consequences of their intentional acts when they performed these acts. According to the PSC, to prevail on this theory, the plaintiffs must show not just mere negligence, but an extreme deviation from the standard of care in the face of a plain and obvious danger.

American counters that, the phrase "reckless disregard for the consequences" requires an examination of the state of mind of the pilots, in order to ascertain if the pilots apprehended that their conduct posed a risk of harm. American concedes, as it must, that the PSC may use circumstantial evidence to show the pilots' state of mind, but insists that we must inquire into what the pilots thought and perceived at the time of the alleged deviations from the standard of care. As support for its position, American relies almost entirely on

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[12] Although American suggests otherwise, *Butler* does not require proof of the intentional performance of a "wrongful" act, as opposed to simply performance of "an act . . . ."

Saba v. Compagnie Nationale Air France. In that case, which arose out of damage to a shipment of cargo, a majority of a panel from the United States Court of Appeals for the District of Colombia Circuit ostensibly construed "reckless disregard" to require a finding that the defendant acted improperly despite being aware of the damage that likely would result from its misconduct. The majority began by explaining that the courts "have never been very clear as to what we mean[ ] by reckless disregard," and then acknowledged that recklessness can have a subjective as well as an objective dimension:

> There is a continuum that runs from simple negligence through gross negligence to intentional misconduct. Recklessness, or reckless disregard, lies between gross negligence and intentional harm. The critical analytical division between the tort that can be made out through presentation of merely objective evidence—without regard to the defendant's state of mind—and one that requires a showing of a subjective state of mind cuts recklessness in half. One meaning of recklessness, then, is simply a linear extension of gross negligence, a palpable failure to meet the appropriate standard of care. The second . . . is a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent. If it were not used as a proxy, it might be all too easy for the wrongdoer to deliberately blind himself to the consequences of his tortious action. [As under the securities laws], reckless disregard, in the Warsaw Convention context, requires a showing that the defendant engaged in an act that is known to cause or to be likely to cause an injury.

78 F.3d at 668-69. The court stressed that this subjective standard could not be met merely by showing "an extreme departure from standards of ordinary care."

> That would be nothing more than gross negligence. [I]f it can be shown that a defendant gazed upon a specific and obvious danger, a court can infer that the defendant

> was cognitively aware of the danger and therefore had the requisite subjective intent. Intent can, of course, always be proved through circumstantial evidence. That is by no means the same thing as saying that the defendant should have known about the danger[. In this case w]e read the Warsaw Convention to limit liability in "situations where a reasonable employee should have but did not understand that her actions posed a substantial risk of harm to a shipper's goods."

Id. at 669. The majority acknowledged that this standard might make it more difficult for plaintiffs to avoid the Convention's limitations on liability, but "the signatories obviously thought the economics of air travel, and therefore the overall welfare of passengers, dictated those limitations [and] it simply will not do for courts to chip away at that liability limit, out of a natural desire to remedy the negligence that can be all too apparent in any individual case." *Id.* at 671.

Judge Wald, in a persuasive dissent, criticized the majority's ostensible approval of a subjective definition of recklessness, suggesting that the majority's analysis created a standard that differs little, if at all, from the objective definition of recklessness applied in prior precedent. As Judge Wald put it, since under the majority's view a plaintiff may use circumstantial evidence to convince a jury to *infer* that the defendant was subjectively aware of the likely negative consequences of its act, there is no palpable difference between this ostensibly subjective inquiry and allowing a plaintiff to prove objective recklessness by showing that the defendant's conduct deviated significantly from the standard of care in the face of a plain and obvious danger. *Id.* at 674-75. In other words,

> the majority's "subjective" standard of reckless disregard requires awareness by the carrier of the likely consequences of its actions, but permits an inference of that state of mind from circumstances in which the carrier departs in an extreme fashion from standards of ordinary care. I agree that either direct or circumstantial evidence

> of this kind of heedless indifference may suffice to show reckless disregard. A de minimis departure from standards of ordinary care would not suffice . . . . But my basic problem is that this is already the law, the same law we have long applied in this court . . . .
>
> [I]n practice, the subjective test will never stray far afield from the objective one. If the majority concedes the legitimacy of an inference of subjective knowledge of consequences from extreme circumstances, the dividing line between these two standards all but evaporates. *Since intent can be inferred from the circumstances, what we are really saying to the parties is that if your behavior deviates substantially from the norm, we will assume that you knew your actions created a very substantial risk of harm to others.*

Id. at 673, 675 (Wald, J., dissenting) (emphasis added).

We find little support in *Saba* for American's argument. To begin with, and of paramount importance, it is *Butler*, not *Saba*, that we are unequivocally bound to follow here. Contrary to American's suggestion, the *Butler* opinion does not adopt whatever definition of willful misconduct is currently used in the District of Columbia Circuit; rather, *Butler* approves a specific definition from a specific opinion, *Tuller*, authored by a specific panel in that Circuit. Moreover, as Judge Wald observed, Judge Silberman's majority opinion, although at times professing to adopt a wholly subjective standard of recklessness, becomes much cloudier upon close examination.

Whatever the intention of the majority, *Saba* plainly does not adopt a purely subjective "actual knowledge" standard. For purposes of comparison, consider the Supreme Court's opinion in *Farmer v. Brennan*, 511 U.S. 825 (1994). In *Farmer*, the Court refused to apply the standard for objective recklessness, and instead held that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official

"knows of and disregards an excessive risk to inmate health and safety." *Id.* at 838. The Court emphasized that, due to the subjective nature of the inquiry, the official "must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*" *Id.* (emphasis added). The *Saba* majority, by contrast, expressly acknowledges that the requisite subjective element can be *presumed*, even if the plaintiff cannot prove that the defendant realized its actions were likely to cause harm, so long as it "can be shown that a defendant gazed upon a specific and obvious danger." 78 F.3d at 669 (emphasis added). The reason for this, concedes the majority, is that otherwise "it might be all too easy for the wrongdoer to deliberately blind himself to the consequences of his tortious action." *Id.* at 668. But a defendant's conduct, says *Farmer*, is *objectively* reckless when the tortfeasor "acts or . . . fails to act in the face of an unjustifiably high risk of harm that is either known or *so obvious that it should be known*." 511 U.S. at 836. The difference between the quoted passage from *Saba* and *Farmer*'s definition of objective recklessness is difficult to ascertain. Indeed, the *Farmer* court indicated that it "would be hard to describe [an] understanding of [recklessness] permitting liability to be premised on obviousness . . . as anything but objective." *Id.* at 841.[13] In short, *Saba* does not write objective analysis out of the willful misconduct inquiry.

During oral argument, American suggested that the *Saba* majority's use of the phrase "gazed upon" requires some level of cognition on the part of the defendant, and thereby sug-

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[13] The Supreme Court made this remark in reference to *Canton v. Harris*, 489 U.S. 378 (1989), which states that a municipality can be liable for failing to train its employees if the plaintiff can establish deliberate indifference; in other words, "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in a violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"—whatever their state of mind. 511 U.S. at 840.

gests that the defendant must actually "process" or "register" the obvious danger. This construction of *Saba* has no foundation in the opinion, and is not consistent with the plain meaning of the word "gaze." More to the point, the reference to "gaze[ ] upon a specific and obvious danger" is simply an "in other words" description of language appearing in *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992), a securities fraud case which does not demand direct proof of the defendant's state of mind, and instead holds that recklessness can be found where there is "an extreme departure from the standards of ordinary care . . . which presents a danger . . . that is either known to the defendant *or is so obvious that the actor must have been aware of it*" (emphasis added). The most that can be said about *Saba*, therefore, is that like *Steadman* it holds that subjective recklessness can, although not necessarily must, be inferred from a showing of objective recklessness. We agree with Judge Wald that this point adds little, if anything, to the prior interpretations of "reckless disregard" as a formula for proving willful misconduct under the Warsaw Convention.[14]

In any event, we reiterate that we are not writing on a blank slate. *Butler* acknowledges that willful misconduct may be proved in one of *three* ways: by showing the intentional performance of an act (1) "with knowledge that the . . . act will probably result in injury or damage"; (2) with "reckless disregard of the consequences"; or (3) with "a deliberate purpose not to discharge some duty necessary to safety." The first theory is a pure subjective inquiry similar to that applied in Farmer. Accordingly, if "reckless disregard," as used in the second prong of *Butler*, is construed to mean subjective reck-

[14] Nor does the majority's observation that the Convention limits liability where the defendant " 'should have but did not understand that its actions posed a substantial risk of harm . . . ,' " 78 F.3d at 699, have a great deal of meaning here, because like Judge Wald, the PSC acknowledges that, to prove willful misconduct using an objective recklessness standard, it must do more than show that the pilots "should have but did not understand that [their] actions posed a substantial risk of harm." It must also show an *extreme* departure from the standard of care.

lessness, as American asserts and *Saba* ostensibly suggests, then it adds absolutely nothing to the first theory recognized by *Butler*. Similarly, if reckless disregard as used in the second prong of *Butler* is construed to incorporate the hybrid subjective/objective inquiry approved in *Steadman*, then this theory has significance independent from the first prong of *Butler* only to the extent that proof of objective recklessness may be used as a substitute for proof of the defendant's state of mind. Simply put, therefore reading the second theory, "reckless disregard of the consequences," to require a jury to make a specific finding that the defendant recognized that its acts were likely to cause harm renders the second theory largely, if not entirely, superfluous. In other words, this reading defeats the Circuit's instruction that there are three alternative theories for establishing willful misconduct. Courts have often recognized that statutory language should be read in a way that does not render certain language unnecessary or redundant. *See, e.g., United States v. Canals-Jimenez*, 943 F.2d 1284 (11th Cir. 1991). The same principle guides us here in our interpretation of binding precedent.

Our reading of *Butler* is supported by the Eleventh Circuit's analysis of the facts in that case, which arose out of an airplane that crashed while attempting to land in poor weather. The court summarized the facts from which the district court "might properly draw the inference that the crew had intentionally performed acts with knowledge that under the circumstances injury might result." 774 F.2d at 431. The court noted that, early in the flight, the crew knew that there were clouds in the vicinity of the airport that "*should have been* monitored . . . ." *Id.* Nevertheless, the radar was turned off and not used, even though "[t]he pilot saw or could have seen severe weather in the vicinity of the airport before the radar was deactivated." *Id.* The court explained that there was an "inference sustained by substantial evidence" that after the crew lost visibility on its descent, it continued to descend "with knowledge that such procedure would probably result in injury to passengers," since "[i]t was their duty to assume

that visibility would remain obscured and to execute a missed approach as soon as they encountered loss of visibility. . . . *Id.* Most telling, however, is the court's conclusion that the district court's findings regarding what the pilots knew or could have known "were based on objective analysis of the recorded data, the exhibits and the opinions of experts rather than on subjective evaluation of the credibility of the crew based on observation of their demeanor." *Id.* at 432. At very least, *Butler* supports the proposition that willful misconduct may be established in a pilot error case even where there is contrary direct evidence of the crew's state of mind. More to the point, language in the opinion, including but not limited to its references to what the pilots should or could have known, suggests that willful misconduct may indeed be established through proof tantamount to objective recklessness.

Equally revealing is the fact that *Tuller*, the single case invoked by *Butler* for its definition of willful misconduct, sustains multiple findings of willful misconduct on a theory of reckless disregard without any clear suggestion that the defendant's employees actually appreciated the harm that likely would result from their conduct. *Tuller* involved the claim of a passenger who drowned after an airplane crashed into a river at the end of a runway. The court found various acts of misconduct on the part of the airline's employees or agents, including among other things a failure to instruct passengers about the location of lifejackets. The court held that "[i]n view of the gravity of the harm which would follow an emergency landing on water on a night flight which contemplated landings and take-offs at at least two airports near the sea, the jury could find that the failure of [the airline] to establish and execute procedures to instruct passengers as to the location and use of life vests was a conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences." 292 F.2d at 779. The court made *no* finding concerning the state of mind of the individuals who failed to "establish and execute procedures" for instructing passengers about the lifejackets. The *Saba* major-

ity attempts to diminish the precedentiAl value of *Tuller* by suggesting that the conduct at issue in that case may not have amounted to anything more than negligence. Not only is this assumption unclear from the *Tuller* opinion, then-Judge Burger's emphasis on the "gravity of the harm" and potential danger associated with the emergency landing process suggests that he found something more than an ordinary breach of duty. In any event, we are concerned only with what light *Tuller* sheds on the phrase "reckless disregard" as adopted by the Eleventh Circuit in *Butler*. The fact that *Tuller* appears to apply an objective standard suggests that a rigorous objective inquiry certainly has a place in the determination of willful misconduct.[15]

Construing "reckless disregard" as tantamount to objective recklessness also makes sound practical and policy sense. If an airline's employees are exposed to a plain, palpable and certain danger, and nevertheless intentionally perform acts that deviate substantially from the acknowledged standard of care, the absence of proof that they subjectively recognized the harm that likely would result from their conduct does not make them a great deal less culpable. Moreover, in pilot error

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[15] American is incorrect is its suggestion, made at oral argument, that the *Tuller* court "described how the actors knew subjectively that there was a wrongful act and that injury was likely to occur." Tr. of August 18th Hrg., at 57. Of the multiple separate acts of willful misconduct discussed in the opinion, in only one instance—when referring to the crew's failure to facilitate the victim's rescue—did the court even arguably suggest that the defendant's employees may have had knowledge of the likely harm from their conduct. 292 F.2d at 780 ("The jury could reasonably find that . . . the failure to take available steps to provide for Tuller's safety was a conscious omission made with reckless disregard of the consequences when it was known he was in a position of peril"). By contrast, the court's discussion of the loss of communication between the plane and the ground does not contain any finding as to whether the responsible employees realized that their failure to maintain or restore radio contact was likely to cause harm. *Id.* at 780-81. Similarly, the court's discussion of the failure to communicate an emergency message to the control tower in the wake of the accident contains no specific finding with respect to the state of mind of the responsible employees. *Id.* at 780.

cases where the responsible actors perish and evaluations of the pilots' state of mind are necessarily speculative, it may impose an inordinate burden on accident victims or their heirs to have to prove by a preponderance of the evidence what the pilots were thinking, or what they knew, when they committed otherwise obvious acts of misconduct. Courts in this Circuit have recognized that a purely subjective inquiry into a party's state of mind, without any gloss of objective reasonableness, may lead to absurd results. *See, e.g., William Penn Life Ins. Co. v. Sands*, 912 F.2d 1359, 1364 (11th Cir. 1990) (holding that, when an insurer seeks to rescind a policy based on the alleged inaccuracy of information supplied to the best of the insured's "knowledge and belief," a court may find a particular representation false as a matter of law, however sincerely it may be believed, if the belief is unreasonable, since " '[t]o conclude otherwise would be to place insurance companies at the mercy of those capable of the most invincible self-deception—persons who having witnessed the Apollo landings, still believe the moon is made of cheese' ") (quoting *Skinner v. Aetna Life & Cas.*, 804 F.2d 148, 149-51 (D.C. Cir. 1986)).

We have no quarrel with the *Saba* majority's suggestion that "[i]t simply will not do for courts to chip away at th[e Warsaw Convention's] liability limit, out of a natural desire to remedy the negligence that can be all too apparent in any individual case." But the test for reckless disregard proposed by the PSC is *not* a negligence or even gross negligence inquiry: it requires not just a breach of the standard of care, but an *extreme* departure from the applicable standard, *as well as* a plain and obvious risk of death or serious injury under the circumstances. Moreover, if the goals of the Convention can only be served by construing the exception to the liability limit as narrowly as possible, then courts could have defined "willful" misconduct solely in the criminal law sense of conduct perpetrated with an "bad purpose either to disobey or disregard the law," Eleventh Cir. Dist. Judges Ass'n, Pattern Jury Inst: Criminal Cases, Basic Inst. No. 9.1 (1985).

While *Butler* recognizes that willful misconduct may be established on this theory, plainly it recognizes that other, less exacting theories may be used instead. For all of the foregoing reasons, we construe the term "reckless disregard," as that phrase appears in *Butler*, to permit a plaintiff to prove willful misconduct by showing that the defendant's conduct amounted to an extreme deviation from the standard of care under circumstances where the danger of likely harm was plain and obvious, even if the defendant's employees—because they deliberately blinded themselves, deluded themselves or simply "fell asleep"—never fully apprehended the danger created by their conduct. As indicated below, however, we are convinced that summary judgment clearly is warranted here even if the inquiry is purely subjective.

V.

The crux of the PSC's summary judgment motion is a claim that the pilots of Flight 965 demonstrated willful misconduct by continuing to descend the aircraft even though it veered wildly off course. Although the Plaintiffs identify many other errors by the pilots, we focus on this issue, not only because the accident would have been avoided if the pilots had elected to suspend the descent once Flight 965 began its sharp turn to the east and flew out of the valley, but also because no other act so convincingly, and so powerfully, supports the entry of summary judgment.

The American Airlines Flight Manual in effect at the time of the crash unequivocally required that, once an aircraft is off the published arrival or approach path, the pilots must not descend below the last assigned altitude. Specifically, "[w]hen operating on an unpublished route . . . the pilot, when an approach clearance is received, shall maintain the last altitude assigned until the aircraft is established on a segment of the published route." PSC Mot., exh. 11, § 10, p. 14. This rule reflects FAR § 91.175, which in pertinent part states that, "[w]hen operating on an unpublished route . . . the

pilot, when an approach clearance is received, shall . . . maintain the last altitude assigned to that pilot *until the aircraft is established on a segment of a published route or instrument approach procedure unless a different altitude is assigned by ATC.*" *Id.*, exh. 27. More generally, but just as critically, American Airlines pilots are forbidden from continuing to descend if they have a doubt about their position in the sky or if they do not know "exactly where they are." *See, e.g., id.*, exh. 8., at 79; exh. 17; exh. 18, Rauhofer dep., at 82.

As noted above, the Defendant does not, and cannot dispute, that Flight 965 was off the published route from approximately 21:37:40, when the "R" was entered and the aircraft began its turn to the left, until the collision with terrain at approximately 21:41:28. The Rozo 1 STAR—assigned by the ATC at 21:36:43 and accepted by the pilots at 21:36:52—called for the pilots to fly south over, and report from, the Tulua VOR, then proceed south along the 202° radial to the D21 CLO waypoint, and then pick up the 1932 radial to the Rozo NDB. The VOR DMR Rny 19 approach similarly began at Tulua. At no point after 21:37:40 did Flight 965 ever establish itself on the applicable published arrival or approach path. *See, e.g.*, PSC Mot., exh. 25, McFall dep., at 619.

Nor does the Defendant dispute that throughout this period, the pilots continued to descend the aircraft without interruption, except during flight's final seconds after the terrain warning sounded. At 21:37:40 (when the "R" command was executed), the altitude was 16,880; at 21:38:28 (with the left turn well underway), the altitude was 15,616; at 21:39:18 (when the plane began to turn back toward the right), the altitude was 13,132. The record indicates that Flight 965 descended as low as 8480 feet before the pilots began their abrupt and unsuccessful attempt to ascend over the terrain. The crash, as noted above, occurred with the aircraft approximately 8900 feet above mean sea level.

On the basis of these facts, the PSC served a request for admission on American Airlines which read: "At approximately 21:39:00 from an off course position, the flight crew

knowingly elected to continue to descend while trying to maneuver the aircraft to intercept the published ULQ/Rozo NDB/CLO approach course to Runway 19 at the Cali airport." The Defendant *admitted* that this statement was correct. From the PSC's perspective, this admission, standing alone, requires the entry of summary judgment, since it amounts to a concession that the pilots knew they were off course and nevertheless chose to descend. Rule 56 itself recognizes that admissions may be considered in resolving summary judgment motions. *See* Fed. R. Civ. P. 56(c); *United States v. 2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992). American, however, suggests that it admitted nothing more than that the flight was off course and that the pilots knowingly elected to descend; in other words, says American, there has been no concession that the pilots *knew* they were off course while they continued the descent, and therefore summary judgment is improper on this basis.

The Defendant's cramped view of its admission is not altogether convincing. To begin with, the PSC had little reason to serve this request if all it sought was an acknowledgment that the plane was off course and a concession that the pilots were descending the plane knowingly (as opposed to unwittingly). if American did not intend to concede that the pilots knew they were off course, it should have recognized that the request was highly susceptible to this interpretation and simply have denied the request as phrased or "set forth in detail the reasons why [it could not] truthfully admit or deny the matter." Fed. R. Civ. P. 36(b). Indeed, the Defendant did just that in response to several other requests for admission served by the Plaintiffs. After all, the point in time denoted in the request—"approximately 21:39:00"—was not chosen accidentally; it was roughly the moment when both Tafuri and Williams made comments plainly suggesting that they realized the plane was not where it was supposed to be. In any event, it is difficult to imagine how the flight crew could have been "maneuver[ing] to intercept" the published route without first *realizing* that they were off the published route and

needed to intercept it, since the aircraft was not, at least at that point, flying itself. Notwithstanding the PSC's invitation to do so, however, we do not resolve the pending motion solely, or even in substantial part, on the Defendant's admission. That being said, the admission confirms two critical and obvious facts, the flight was off course and the pilots were continuing to descend, and at the very least provides one more piece of evidence that would preclude a reasonable juror from concluding that the pilots never apprehended that Flight 965 had veered off the published route.

A finding that the pilots knew, or plainly must have known, that Flight 965 was off course is an essential predicate to a finding of willful misconduct in this context, and it is the principal issue controverted by American. To reiterate, under the law of this Circuit, and in this context, a showing of willful misconduct requires proof that the pilots of Flight 965 either (1) committed an intentional act with knowledge that harm was likely to result; or (2) demonstrated a reckless disregard of the consequences—in other words, committed an extreme violation of the standard of care in the face of a plain and obvious danger. The first of these inquiries is essentially subjective, while the second is largely objective.

Before going further, though, we must address a threshold inference that American Airlines asks us to draw, since this inference shapes our analysis of the pilots' continued descent. It is American's position that, contrary to the PSC's argument, the pilots of Flight 965 did not intend to abbreviate the Rozo 1 STAR by bypassing Tulua and instead flying direct to Rozo. From the Defendant's perspective, the pilots, at least until the last two minutes of the flight, intended to pass over the Tulua VOR, and believed they were on the published course to do just that.

There is some evidence to substantiate the Defendants' view that the pilots did not intend to follow a short-cut to the Cali airport. To begin with, the Rozo 1 STAR does not begin at the Rozo NDB; rather, it begins at the Tulua VOR, and ends at the Rozo NDB. American asserts that this anomaly is

contrary to international conventions, and may explain why, at 21:37:29, Tafuri asked the ATC for permission to "go direct Rozo" when he really meant to say "go direct Tulua" and *from there* follow the Rozo 1 STAR. After all, says the Defendant, the remark "Can American 965 go direct Rozo and then do the Rozo arrival" makes little sense on its face, since the Rozo 1 STAR ends at Rozo. As American sees it, Williams (not Tafuri) typed what he thought was the identifier for Rozo, out of a similarly mistaken assumption that the Rozo 1 STAR began at Rozo. American adds that, if the pilots intended to bypass Tulua and fly direct to Rozo, then their subsequent, repeated efforts to locate the Tulua VOR are difficult to understand.

There are significant holes in American's argument, even if we accept that Tafuri could have misspoken not once, but twice (since he referred to Rozo again at 21:37:42). It is extremely unclear why Tafuri would have sought permission to "go direct [Tulua]." American suggests we can infer that the pilots, at this point, were still operating under the assumption that they were cleared on a direct route to the Cali VOR and therefore needed ATC approval before heading to Tulua. But the very last instruction from the ATC, less than 30 seconds earlier, at 21:36:58, was "Report . . . Tulua VOR." This instruction, expressly acknowledged by Tafuri, was given in conjunction with the new clearance to land on Runway 19 after taking the Rozo 1 arrival path. There is little room for argument that, whatever the pilots may have believed about the appropriateness of a direct path to the Cali VOR prior to 21:36:43, at that point they recognized that they were required to follow the ATC's command to use the Rozo 1 STAR. There are other patent inconsistencies in the Defendant's position. As the PSC observes, the fact that Tafuri attempted to "tune" in the radio frequency for the Rozo beacon at 21:38:01 cannot easily be squared with the notion that Tafuri, at that point, really meant to fly to Tulua. Moreover, the "go direct [Tulua]" request came immediately after a conversation between Tafuri and Williams in which the pilots,

apparently looking at the charts, observed that Rozo "comes off Tulua." Proof that the pilots continued to search for Tulua after the "direct to Rozo" request may show nothing more than the pilots' second thoughts about abbreviating the Rozo 1 STAR. Flight 965 was behind schedule, and portions of the CVR arguably can be read to suggest that pilots were concerned about this delay. And of paramount importance, the Defendants' speculation about the pilots' state of mind is largely incompatible with what was actually said and done in the cockpit. For present purposes, though, it is enough for us to observe that, if we accept American's generous reading of the evidence, the pilots necessarily intended to fly the Rozo 1 STAR and understood that they were expected to follow the published route to Tulua and begin the Rozo 1 STAR at that point. This point is critical, since American's position collapses if the proof establishes that the pilots continued their descent once they knew, or plainly must have known, that Flight 965 was no longer on this route.

A.

We begin with the issue of objective recklessness. As noted above, the applicable standard of care, reflected in American Airlines' own policy, explicitly forbids pilots from continuing to descend if they are meaningfully off the published arrival and approach route or if they do not know where they are. No reasonable jury could conclude the pilots of Flight 965 complied with *either* of these rules. The record makes plain, and indeed American has acknowledged, that the aircraft was off course for roughly the final four minutes of the flight, but nevertheless continued to descend. And the deviation was not insubstantial, as American concedes.[16]

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[16] *See, e.g.*, Tr. of August 25th Hrg., at 40:

> Court: There is no dispute that they were plainly far off course, right?

(footnote continued)

Moreover, the record makes plain that Flight 965 descended well below 15,000 feet—the last altitude clearance supplied by the Cali ATC—and in so doing violated the standard of care embodied in FAR § 91.175, which as noted above forbids pilots from descending below the last cleared altitude before being established on the published route. The clearance to 15,000 feet came at 21:35:14, and was expressly acknowledged by Tafuri:

> 21:35:14
> Tafuri — Okay, understood cleared direct to Cali VOR uh, report Tulua and uh, that altitude one five, that's fifteen thousand, three zero zero two, is that all correct sir?
>
> 21:35:25
> ATC — Affirmative
>
> 21:35:27
> Tafuri — Thank you

American maintains that, two minutes later, when the ATC approved the Rozo 1 STAR and the approach to Runway 19, he superseded the prior instruction and gave Flight 965 permission to descend as low as 5000 feet. The Defendant concedes that the ATC never said quite this; nevertheless, it argues that a reasonable jury could infer that a lower altitude was in fact assigned. The exchange highlighted by American reads as follows:

> 21:36:31
> ATC — Kay sir, the wind is calm, are you able to approach Runway One Niner?

Counsel: Correct.

Court: The only question is what did they know or perhaps what they should have known under the circumstances? But plainly they were way off course. They were headed in 90 degrees the wrong direction, right?

Counsel: That's correct, your Honor.

21:36:36
Tafuri — Would you like to shoot the One Nine straight in?

21:36:38
Williams — Uh, yeah, we'll have to scramble to get down, we can do it

21:36:40
Tafuri — Uh, yes sir, we need lower altitude right away though

21:36:43
ATC — Roger, Nine Six Five is cleared to VOR DME approach to Runway One Niner, Rozo Number One arrival, report Tulua VOR

21:36:52
Tafuri — Cleared the VOR DME to one Nine, Rozo One uh, arrival, we'll report the VOR, thank you sir

21:36:58
ATC — Report uh, Tulua VOR

21:37:01
Tafuri — Report Tulua . . . .

21:37:29
Tafuri — Uh, can, American Airlines uh, Nine Six Five go direct to Rozo and then do the Rozo arrival sir?

21:37:36
ATC — Affirmative, take the Rozo One and Runway One Niner, the wind is calm

21:37:42
Tafuri — Alright, Rozo, the Rozo One to One Nine, thank you, American Nine Six Five

21:37:46
ATC Affirmative, report Tulua on uh, twenty-one uh, miles uh, five thousand feet

21:37:53
Tafuri Okay, report Tulua at twenty-one miles and five thousand feet, American Nine uh, Six Five. . . .

The Defendant suggests that the comment "report Tulua on uh, twenty-one uh, miles uh, five thousand feet" could reasonably be construed as a clearance to descend to 5000 feet. This authorization makes sense, according to American, if we assume that the ATC construed Tafuri's request to go "direct to Rozo" as just that (a request to bypass Tulua and go straight to the Rozo NDB), since the aircraft would have to make a relatively quick descent in order to be at an appropriately low altitude when passing the Rozo beacon. Indeed, says American, the ATC knew that a lower clearance was required, due to Tafuri's observation that Flight 965 could do the Runway 19 approach if given a "lower altitude right away."

There are multiple flaws with this theory. Initially, and most fundamentally, the ATC plainly did *not* say that Flight 965 was cleared to 5000 feet. American supplies us with no basis to believe that an instruction to "report" at a certain point or points is considered the equivalent to modifying an altitude restriction. The term "report" has a plain and distinct meaning in this context, as evidenced by the ATC's three prior instructions to "Report Tulua," and if the ATC intended to clear Flight 965 to descend down to 5000 feet, he surely could have said so expressly. Moreover, if American is correct in its interpretation of what the ATC meant to say, then literally Flight 965 could have *immediately* dipped to 5000 feet, from any point in the sky. But even the Defendant acknowledges that the pilots could not do quite that. For example, Murray Daigle, one of the Defendant's experts, explained that the ATC did not clear Flight 965 to descend to

5000 feet from any point in the sky since this clearance would apply only if the aircraft was established on the approach. Daigle dep., at 133. The Defendant's pilot expert, Jeff Noe, likewise conceded that Flight 965 was not cleared to 5000 feet unless the pilots were established on the approach. PSC Mot., exh. 21, at 143. Daigle, as well as American's counsel at oral argument, added that Flight 965 could not have dropped to 5000 feet, let alone below 15,000 feet, before the pilots reported that they had passed over Tulua. *Id.*, exh. 34, at 214; Tr. of August 25th Hrg., at 35. Given these limitations, it is simply not plausible to suggest that the ATC intended to amend his prior instruction by giving Flight 965 unlimited license to drop below 5000 feet from any point in the sky.

The very *most* that can be inferred, therefore, is that the ATC cleared the airplane to 5000 feet so long as it was following a direct path to the Rozo NDB. Dep. of Manuel Hugonnett, at 106-07. But we are not convinced that any reasonable juror could infer that the ATC meant to assign to Flight 965 a direct path to Rozo, since his comment "report Tulua" is completely inconsistent with the notion that the aircraft would be traveling straight to Rozo.[17] Without question, the most plausible interpretation of what the ATC meant to say is that he wanted Flight 965 to follow the Rozo 1 STAR and report at Tulua as well as at the D21 waypoint, which is located 21 miles from the Cali VOR and at which aircraft are supposed to be no lower than 5000 feet. This is consistent with the different meaning of "direct" in Latin American, and indeed, the initial CVR transcript actually reads "Report Tulua and 21 miles, ah 5 thousand" (emphasis added).[18] We need not conclusively accept this interpretation to highlight the weakness in American's position, though. The Defendant

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[17] Keep in mind that at this point, according to American, the pilots intended to fly to Tulua and did not intend to fly direct to Rozo, so permission to descend to 5000 feet on a direct path to Rozo would (using the Defendant's logic) have been of no moment.

[18] The CVR tape convincingly supports the language that appears in the original transcript.

at one point suggests that the ATC may have misspoken when he said "report Tulua" because he really meant to authorize a direct flight to Rozo. But it simply strains credulity too far to maintain that, within a span of several seconds, both Tafuri *and* the ATC meant something other than what they plainly and unequivocally said. In short, the inferences suggested by American are not reasonable, and no rational juror could find that Flight 965 was officially cleared to descend below 15,000 feet. In any event, even if a jury could infer that the ATC truly did permit Flight 965 to descend to 5000 feet from any point in the sky (let alone if the most a jury could infer is that the ATC permitted the aircraft to descend to 5000 feet when approaching "direct to Rozo")—in short, *even if* we *accept* the Defendant's arguments—it would be no less egregious a breach of American Airlines policy if the pilots continued to descend without knowing where they were or if the pilots continued to descend while the aircraft was off the airway to the east of the valley. *See also infra*, at 88-89.

Of the greatest importance is the fact that the pilots' continued descent, notwithstanding the aircraft's off course position, was no forgivable or insignificant breach of the various standards of care; it was, instead, an extreme deviation from the conduct required by the relevant circumstances, and no reasonable juror could conclude otherwise. During the approximately four minutes that elapsed between the entry of "R" into the FMC and the crash, Flight 965 descended from just under 17,000 feet to almost 8000 feet, a substantial and prolonged drop in altitude that brought it closer and closer to the high terrain below. The descent did not reflect a single, isolated miscalculation; rather, the pilots elected to continue the descent without interruption until the final ten seconds of the flight. They had repeated opportunities and more than ample time to suspend the descent and, if not ascend, at least maintain a level altitude until the aircraft established itself on the airway. There is simply no basis to describe this choice as a minimal departure from the standard of care embodied in American Airlines policy and the FAR's. It was an act of

grievous malfeasance that powerfully supports a finding of recklessness.

We come, therefore, to the critical question of whether the danger of continuing to descend under these circumstances was so profound, and so obvious, we can "infer" the pilots recognized that their conduct was likely to lead to injury. No one can dispute that, if indeed it was obvious that the aircraft was off course (and specifically, to the east of the valley), the deadly risks associated with continuing to descend while attempting to navigate the mountainous terrain surrounding the airport would be equally patent. The charts consulted by the pilots during Flight 965's final minutes made absolutely plain the presence of high mountain peaks and ridges on either side of the valley. More to the point, both Tafuri and Williams had been trained to recognize the danger posed by high terrain to aircraft landing at Latin American airports. As one training manual made clear, "knowing where you are in the terminal area, around the dangerous high terrain airports of Central and South America, can be vital [since t]he tolerances get finer and finer as you get into high mountains." PSC Mot., exh. 8, at 72. Simply put, no reasonable juror could say that the danger of continuing to descend from a position substantially off the published arrival path to the Cali airport would be anything other than obvious to pilots under these circumstances.

Nor, we conclude, could a reasonable juror find that the aircraft's deviation from the published arrival path would be anything other than obvious to pilots in the position of Tafuri and Williams. American has attached a great deal of importance to its suggestion that however off course Flight 965 became, and remained, during the final four minutes, the pilots continually believed the aircraft was on, or extremely near, the published route. Whatever the plausibility of this argument, which we discuss separately below, the crucial fact remains that virtually every navigational aid available to the pilots would have made *abundantly* clear that Flight 965, for most if not all of the final four minutes, was nowhere near the

published route. And there is no doubt that the pilots were fully aware of just what the flight plan required and the published route entailed. *See, e.g.*, PSC Mot., exh. 30, Trudeau dep., at 67-68; exh. 11, at § 3.5; Def. Resp. to PSCIs Local Rule 7.5 Statement of Facts, at 14-15; Def. Resp., at 20 n.33 ("American is entitled to the inference that statements by the crew reflect analysis and discussion of what the approach entailed' "). Nor is there any dispute that the Tafuri and Williams were required to, and indeed did, consult their charts during the final four minutes of the flight, and also examined the instruments in the cockpit. As American acknowledges, during the final minutes of the flight, "[t]he pilots were extremely busy reading and setting instruments . . . and reading charts." Def. Resp., at 9; *see also, id.* at 24 (reiterating that the pilots were examining their charts); PSC Mot., exh. 25, McFall dep., at 653-56 (noting the crew's duty to monitor the heading of the aircraft and instruments reflecting the changes in altitude).[19]

Multiple indicators would have made absolutely clear the discrepancy between the published route and the aircraft's location. First, American does not dispute that the cockpit contained no less than seven magnetic compasses (three in the vicinity of each pilot and one in the center) which would have reflected the over 90° left turn that occurred after entry of the "R" into the FMC. *See* Tr. of August 25th Hrg., at 42. When "R" was entered at 21:37:40, the aircraft's heading was 193.2°. Within thirty seconds, at 21:38:10, the compass heading was down to 166°. At 21:38:40, one minute after entry of the "R", the compass heading was 135°. Forty seconds later, the compass heading had dropped to 100°. There is no room to dispute, therefore, that for a period of one minute and forty seconds, the seven compass headings in the cockpit made clear that the aircraft had been turning to, and flying sharply toward, the east and the mountain peaks. Although American

[19] The CVR transcript itself makes clear that both the flight plan and the approach plates for the Rozo One arrival were in the cockpit and consulted by the pilots. *See* Def. Resp., exh. 1, at 20-21, 34-36.

has at times suggested that the pilots "failed to perceive" the left hand turn, during oral argument its counsel acknowledged that the pilots "had a lot of cues to tell them they were in a left-hand turn" and at least Tafuri eventually came to realize that the airplane was turning left. Tr. of August 25th Hrg., at 44. But the compasses did more than tell the pilots that the aircraft had veered to the left; they made absolutely clear just how sharp a turn had been made and how far off course they were.

Even a cursory glance at the charts would have made plain that the published route did not call for incoming aircraft to be traveling on a heading *anywhere near* 150°—let alone 140°, 130°, 120°, 110° or 100°. And it was not just during the left turn that the compass heading provided obvious clues to the pilots; even *after* the aircraft began to turn back to the right, it was not until the final minute of the flight (almost eighty seconds after the right turn was initiated, and with the aircraft having dipped below 10,000 feet) that the heading reached 170°, and not until 21:40:50, less than forty seconds before the crash, did the heading return to 193°. Yet even at this point, American insists that the pilots did not have reason to believe the aircraft was off course. We are unconvinced. Indeed, not all of the Defendant's witnesses seem convinced. For example, during his deposition, Tommy McFall, the Defendant's "Managing Director for Safety," offered the following observations:

> Counsel: Is it not an absolute requirement for at least one of two pilots to recognize promptly when the aircraft is commencing a deviation from an approach course that ends up being perpendicular to the approach course they were properly supposed to be flying?
>
> McFall: Yes . . . .
>
> Counsel: *Pretty soon after the off course events begins to take place somebody in the cockpit has to recognize, "Hey, we are off course, We are going off course"?*

McFall: *Someone should have recognized that, yes. sir . . . .*

Counsel: How could one possibly not perceive that one was moving to a point 90 degrees off course?

McFall: I don't know how that happened. I could not tell you how that happened. . . .

Counsel: *When they reached a heading, a magnetic heading of 100 degrees, were they required, if they had their heads on the instruments. to see that?*

McFall: To see that 100 degrees?

Counsel: Yes.

McFall: Well, once again, I have already acknowledged that *the crew should have been aware of their heading.*

PSC Mot., exh. 25, at 687-89 (emphasis added).

Moreover, the cockpit contains, on both sides, an instrument that reflects the degree of roll by the aircraft as it turns. Almost immediately after entry of the "R," this indicator reflected a bank angle to the left. By 21:37:51, eleven seconds later, the degree of roll was 18°, where it remained until, at 21:39:11, the pilots began to turn back to the right. It would have been clear, therefore, that the aircraft had made a substantial turn—a turn that, by every objective measure, was completely incompatible with the published arrival and approach route.

American counters that, while the sharp left turn was underway, the course deviation indicator (D Bar) function of Captain Tafuri's EHSI screen, in VOR mode at the time, "would have led [him] to understand that . . . the course to Tulua was to their left, and that a turn to the left was acceptable." Def. Resp., at 47. American explains that, because at 21:38:36 Tafuri had mistakenly dialed 116.7 (the frequency for VVC, a waypoint located well to the east) into his VOR instead of the proper frequency for Tulua (117.7) , the D Bar function, as well as the needles on the RDMI instrument,

would have suggested that the aircraft had not yet traveled far enough south and east to reach Tulua.[20] American goes on to say that, once Tafuri correctly dialed the frequency for Tulua at 21:39:24, the D Bar moved to the bottom of the screen, suggesting that the aircraft had passed the intercept "very close to" Tulua and that therefore the plane needed to turn right, back to the west and towards the 202° radial he had reason to believe he had just crossed.

But this theory suffers from several critical flaws. First and foremost, whatever the D Bar may have suggested, and even assuming that Flight 965 was approaching Tulua from the northwest side of the valley, there is simply *no way* to square a magnetic compass heading of 150°, *let alone* 120° or 100°, with what the charts portrayed as the appropriate route. Second, if Tafuri placed such heavy emphasis on the D Bar (to the exclusion of all other clues to the aircraft's true position), and the EHSI display in VOR mode indicated that the aircraft was still west of Tulua and the 202° radial (as American asks us to infer) until the captain correctly dialed the frequency for Tulua, why did he direct Williams, twenty seconds *beforehand*, to "come to the right . . ."? Although American suggests that Tafuri "realized" that a right turn was needed to "shallow out the intercept angle," *id.* at 48, it does not identify the reason for this speculation, or explain why the same indicators that would have told him to "shallow out the intercept" would not also have made clear the degree to which the aircraft had veered off course or the extent to which the aircraft had banked to the left.

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20 "This misdialing of the Tulua frequency is yet another mistake identified by the PSC. At oral argument, American's counsel suggested that Tafuri may not have done anything improper; rather, the FMC may have "auto-tuned" the wrong frequency. The foundation for the Defendant's suggestion is unclear. In addition, the Defendant's suggestion that the ATC "interrupted" the tuning of the frequency for Tulua is not consistent with the record, which reflects that 116.7 was tuned several seconds before the ATC asked Flight 965 to identify its distance from Cali.

There is an even more glaring weakness in American's position, though. At 21:39:16, seconds after the aircraft began its turn to the right and just before Tafuri dialed 117.7, Tafuri told Williams that Tulua should be "on your map." The First Officer, looking at his EHSI screen in map mode, responds "Yeah that's a left uh, left turn to [Tulua]"—understandably, since Flight 965 is now sufficiently far south and east of Tulua that the aircraft would have to turn left in order to go back to that waypoint. The subsequent exchange between the pilots makes clear that Williams, if not Tafuri as well from across the cockpit, can see that to reach Tulua, the aircraft must turn to the left, not the right; so at 21:39:31, Williams specifically asks Tafuri "[l]eft turn, so you wanna left turn *back around* to ULQ?" (emphasis added). Consequently, it is implausible to suggest that, when the D Bar dropped off Tafuri's EHSI screen in VOR mode, the pilots still had a reasonable basis to believe that the aircraft was on course; if anything, the EHSI map would have confirmed what other, less sophisticated instruments were telling the pilots in no uncertain terms: wherever the aircraft was, from that point forward, it most assuredly was *not* on the airway. Notably, the PSC has suggested, and the Defendants have not disputed, that the compass heading is indicated at the top of the EHSI screen in map mode, so the pilots, if in fact they were relying on the computer-generated map, could not but have been aware of just how sharp a turn the aircraft had taken.

The charts themselves must have told the pilots a great deal about how far off the airway they were. American concedes that there came a point when the pilots apprehended that they were south of Tulua. Tr. of August 25th Hrg., at 52, 83. Specifically, the Defendant acknowledges that by 21:40:01, when Tafuri reported that the aircraft was still 38 miles north of Cali, the pilots realized that they had missed Tulua. This view is extremely generous, since as early as 21:39:31 Williams asked Tafuri, after looking at his EHSI screen in map mode, whether the captain wanted a left turn "back around" to Tulua. In any event, it is beyond question that the

pilots knew not just that Tulua was some distance to the north, but that Flight 965 had never passed over or reported from the VOR (after all, at 21:40:40—40 seconds prior to the collision—Tafuri was *still* attempting to locate Tulua). Nevertheless, American suggests that even at this time, it was not obvious that the flight was off course. The charts made altogether clear, though, that an aircraft attempting to navigate a landing at the Cali airport along the arrival and approach path prescribed for Flight 965 could *not* have bypassed Tulua to the north and still been in compliance with the published route. Accordingly, since the charts were open and available to the pilots, they had absolutely no basis to think that the flight was on course. When asked to explain his apparent view to the contrary, the most American's counsel could do was argue that "the course is there whether we are there or not" and suggest that, were it not for the "R/Rozo anomaly," the aircraft would have been "almost directly" over the course. Tr. of August 25th Hrg., at 84-85.

The final, and perhaps most striking, piece of information that plainly must have alerted the pilots that Flight 965 was off the published route was revealed by the DME indicators. Recall that, at 21:34:57, several minutes before entry of the "R," the pilots advised the ATC that the DME from the aircraft to the Cali VOR was 63. The next report is made at 21:38:46, approximately one minute after the start of the left turn, with the compass heading down to 130°. According to the pilots, the DME at this point was 38. During the ensuing one minute and fourteen seconds, the pilots discontinued the left turn and commenced a turn back to the right while traveling at an air speed in excess of 250 knots. But at 21:40:01, the pilots again reported the flight to be 38 miles north of Cali. In other words, the aircraft had drawn *no* closer to the Cali VOR. It was obvious, at this point, if not much earlier, that Flight 965—whatever its position in the sky—was not following the published arrival and approach path, since it seems patently impossible to be traveling on the published route, at this stage, at a speed in excess of 250 knots, and not

a move single mile closer to Cali. And if there was any doubt about the pilots' ability to grasp the implications of the information they presumably monitored throughout the flight, and specifically reported at 21:40:01, twenty seconds later, at 21:40:21, Tafuri commented that the DME was down to 37. Given the fact that the aircraft had just traveled a mile closer to the Cali VOR over a twenty-second span, it was altogether more obvious that the aircraft's failure to move a single mile closer during the prior one minute, fourteen second span meant that Flight 965 had been flying off the published route for a significant period of time.

In short, given the substantial number of clues indicating that Flight 965 was off course and well to the east of the airway, there is simply nothing for a jury to decide on the issue of objective recklessness. On this record, no reasonable juror could conclude that the pilots did not commit prolonged and extreme violations of multiple standards of care in the face of plain and obvious dangers associated with landing amid rugged mountainous terrain at the Cali airport. The flight plan, the charts examined by the pilots, the EHSI map and the instruments in the cockpit made it altogether *obvious* that, once the left turn began, the aircraft was no longer on the published route, and had not yet rejoined the route for the duration of the flight. The plane's continued descent under these circumstances, at night, amid high terrain that the pilots knew posed potentially grave danger to incoming aircraft that drifted out of the valley, was reckless as a matter of law. Even if we were to assume that the D Bar function gave one of the pilots a plausible foundation to believe, for a period of time, that the aircraft was somehow on course despite its sharp turn to the left (an assumption that simply cannot be sustained on this record), Captain Tafuri's express acknowledgment of the fact that the plane had traveled not one mile closer to Cali over a one minute, fourteen second span, coupled with all of the other clues in the cockpit, must have made plain that the flight had deviated substantially from the airway and the published route. American argues that the tremendous signifi-

cance of this and other information never fully dawned on the pilots. It is for precisely this kind of circumstance, however, that the law of the Eleventh Circuit permits a finding of recklessness even without conclusive evidence that the actors understood the wrongfulness of their conduct.

B.

Our ruling, however, does not turn solely on the objective recklessness of the pilots. No reasonable juror, even drawing all inferences in favor of the Defendant, could accept the proposition that the pilots never apprehended that the aircraft was profoundly off course while they knowingly and intentionally elected to continue the descent. As a result, the Plaintiffs unquestionably must prevail, since the pilots were trained to know, and the charts reminded them, that continuing to descend from a significantly off course position in mountainous terrain during an approach to a Latin American airport like Cali might well result in a collision with terrain. *See, e.g.*, PSC Mot., exh. 25, McFall dep., at 799-800 (acknowledging that the flight crew was "supposed to know from familiarizing itself with the terrain in the vicinity of Cali that if they turned left from a basically southerly heading down the valley that they would then be pointed at the mountains"); *id.*, exh. 8, at 77-79. The Defendant has never argued otherwise; indeed, at oral argument American's counsel squarely acknowledged that, under the circumstances of this case, a finding of subjective recklessness (which is tantamount to the first *Butler* theory of willful misconduct) would be appropriate if the pilots continued to descend from a position they knew was off the published route:

> Court: Assume for the purpose of the question . . . that the pilots came to realize at some point that they were off course and, nevertheless, knowingly continued to descend[,] is there any basis on which a reasonable juror could say that such conduct at night in known moun-

tainous terrain was not a violation of American policy and was anything other than reckless? . . .

Counsel: No, Judge. I mean, I think it goes without saying. If the crew knew that they were off course and lost and they were in mountainous terrain and it was nighttime and they didn't know where the airplane was and they didn't think it was safe—

Court: I didn't ask you that. . . . We can keep adding facts and adverbs and embellishing it, but let me just focus just so I understand clearly what American's position is. Assume, one, for the purpose of my question, that there came a point in time when the only way to read this transcript is that the pilots came to realize that they were off course. Assume, two, that they continued to descend, because there is no question that they continued to descend until the warning of the terrain comes up. Is there any basis on which a reasonable juror could say that such conduct flying into Cali at night in known mountainous terrain was anything other than reckless? How could they reach that conclusion?

Counsel: Well, I think it would be a degree of being off course, but if the jury wants to believe and come to the conclusion that we knew *we were off course, significantly off course. knew that that was the fact and then we continued to descend, I don't know they would have any other choice,*

Tr. of August 25th Hrg., at 63-64 (emphasis added). American's witnesses testified similarly. Al Madar, the defendant's "Manager of Flight Standardization" and one of the coordinators of its in-house investigation of the crash, offered the following observations:

Madar: Let me make the statement that I've made before. A pilot who intentionally descends into—below an altitude that takes him below known terrain when he does not know where he is, that would be wrong, one

> hundred percent. *He should know where he is before he descends and know where the terrain is before he descends.*
>
> Counsel: Correct? It's a deliberate, willful, conscious decision to do something, right?
>
> Madar: it seems to be a fair characterization. I mean if assuming that the person is in full control of his faculties and other assumptions of such, then I would assume that if he knew all those things, that it's a willful act that may be inappropriate, based on the circumstances you've set forth.

PSC Mot., exh. 26, at 304-05 (emphasis added). Barry Trudeau, the defendant's chief technical pilot, when asked during his deposition whether "if you don't know where you are and you know there are mountains in the area and you consciously decide to continue a descent, you would characterize that decision as *suicidal*?", answered "That's right." PSC Mot., exh. 30, at 303-304 (emphasis added). These admissions do nothing more than acknowledge the importance of the "objective" standard of care embedded in American Airlines' training: "Do not descend unless you know exactly where you are and the safe minimum altitude" and "[w]hen operating on an unpublished route . . . [you] shall maintain the last altitude assigned until the aircraft is established on a segment of the published route." *See*, *supra*, at 10-16, 53-54.

Our analysis of the pilots' state of mind necessarily must draw on the CVR and the reasonable inferences that can be made based on the pilots' remarks.[21] Nevertheless, although

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[21] As noted above, the Defendants' most recent transcript reflects, at several points, changes in language that lend more support to American's view that the pilots never realized they were off course. For example, a remark by Williams at 21:38:49 is altered from "Uh where are we" to "Uh, were we," a change that is not easy to square with the words recorded on the tape (which the Court has reviewed in chambers and in the presence of counsel). Similarly, another remark by Williams at 21:38:58 is altered from "yeah, where we headed" to "Yeah, where are

the transcript does not reflect this fact, American concedes that there *did* come a point when the pilots apprehended that the aircraft was headed in the wrong direction. As the Defendant sees it, this point did not occur until approximately 21:39:05, when Tafuri first advised Williams to "come to the right a little bit."[22] This instruction, says American, prompted

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we headed now." Nevertheless, for purposes of this Order, we will accept American's twist on what the pilots said, since even using the McDermottt transcript it is no less plain that, at some point during the descent, the pilots realized they were off the published route.

[22] Of course, as noted above, American never explains quite how Tafuri came to believe that a right turn was necessary without also noticing, by reference to the charts, the compass headings and other objective data, just how far in the wrong direction the aircraft was pointed and for how long it had been traveling to the east. After all, when Tafuri said "come to the right a little bit," the compass heading was 111° and still dropping, and the roll was 18°.

That being said, there is no room to dispute that the pilots did realize they were going the wrong way. For example, during his deposition, American's chief pilot, Cecil Ewell, made the following concessions:

> Counsel: Okay. Now, let's talk about what they do know as of 21:38:54, roughly, when the captain says, "LET'S GO RIGHT TO TULUA FIRST OF ALL," they know at approximately that point in time that their heading is somewhere between 122 and 110 degrees depending upon when exactly in that short time frame they pick up the turn?
>
> Ewell: Yes, sir.
>
> Counsel: They know that that heading is incorrect? I think you would have to assume that because they have looked at the approach plate, they see that there is nothing like a 120-degree heading on it because they had that out before and you would assume that they know generally that the valley is oriented north/south with the mountains on the east and the west?
>
> Ewell: Yes.
>
> Counsel: *And there is nothing in the approach to Runway One Nine that would call for a heading of 120 degrees?*

(footnote continued)

a fairly immediate correction of the problem (the right turn was initiated some seven seconds later), after which the pilots believed they had "reconciled conflicting information" and were back on course in the valley. The Defendant acknowledges that the pilots were at least negligent in failing to perceive the left turn for as long as they did, but insists that the CVR contains no evidence that the pilots actually perceived the turn until a great deal of the damage had been done.

It is extremely difficult to accept the notion that, for a span of, at the very least, a minute and twenty seconds, with the aircraft's heading dropping rapidly from 193° to 111°, pilots with the skill and experience of Tafuri and Williams continued to believe they were tracking the published route to

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Ewell:	*Correct.*
Counsel:	So we know that they know that?
Ewell:	Yes.
Counsel:	Would you assume or would you opine, Captain Ewell, that they know they are descending?
Ewell:	Yes. . . .
Counsel:	Now, you would agree with me, Captain, that in order to have good positional awareness, situational awareness, the crew would either have to know for how long they had been traveling to the left or would have to reestablish their position using instruments in the cockpit?
Ewell:	In order to have situational awareness?
Counsel:	Yes, sir.
Ewell:	I believe so.
Counsel:	Is it fair to say that as of this point in time that we have just been looking at, 21:38:54 to 21:39:05—are you with me so far?
Ewell:	Yes.
Counsel:	—that the flight crew *did not know their exact position vis-a-vis the airway because they didn't know how long they had been flying off it?*
Ewell:	*I agree with that.*

Ewell dep., at pp. 586-87, 90-91 (emphasis added).

Tulua. But let us assume, for present purposes, that American is correct in its suggestion that a reasonable jury could infer (1) the pilots truly did not perceive the turn for a significant period of time, (2) even when they perceived that the aircraft was headed in the wrong direction, they didn't believe the aircraft was far off course, because they didn't know how long the aircraft had been turning, and (3) once it became clear that the heading was wrong, the pilots acted promptly and believed they had put themselves back on course. The most powerful evidence that the pilots knew they were off course, and yet continued to descend, is the conversation that unfolds *after* the turn back to the west is initiated. The critical excerpts from American's second CVR transcript appear below, starting shortly after Captain Tafuri's initial, unsuccessful attempt to dial the frequency for Tulua. Keep in mind that American does not dispute that, by 21:40:01, if not substantially earlier, the pilots knew that the aircraft was south of Tulua and also knew that the aircraft had not reported passing over that waypoint.

21:38:54	
Tafuri	Let's go right O uh, Tulua first of all, okay?
21:38:58	
Williams	Yeah, *where are we headed now*?
21:38:58	
Tafuri	Seventeen seven, ULQ uh, I don't know, what's this ULQ, *what hap, what happened here*?
21:39:04	
Williams	Manual heat
21:39:05	
Tafuri	Let's come to the right a little bit
21:39:06	
Williams	Yeah, *he's wanting to know where we're headed*

21:39:07
Tafuri ULQ, I'm gonna give you direct Tulua

21:39:10
Williams Okay

21:39:10
Tafuri Right now

21:39:11
Tafuri Okay you got it?

21:39:13
Williams Okay

21:39:14
Tafuri And

21:39:18
Tafuri It's on your map, should be

21:39:19
Williams Yeah that's a left uh, left turn to ULQ

21:39:22
Tafuri Yeah, *I gotta identify that fucker though*, I

21:39:25
Tafuri Okay I'm getting it, seventeen seven, *it just doesn't look right on mine, I don't know why*

21:39:30
Williams Left turn, so you wanna left turn back around to ULQ?

21:39:32
Tafuri No

21:39:33
Tafuri Hell no, let's press on to

21:39:35
Williams Well we're

21:39:36
Williams *Press on to where though*

21:39:37
Tafuri Tulua

21:39:39
Williams That's a right, no that

21:39:40
Tafuri *Where're we going*, one (twe) (partial word), come to the right, let's go to Cali first of all, let's, *we got fucked up here didn't we?*

21:39:45
Williams *Yeah*

21:39:46
Tafuri Go direct CLO

21:39:47
Williams Okay, oh

21:39:51
Tafuri *How did we get fucked up here?*

21:39:54
Tafuri Come to the right, right now, come to the right right now

21:39:55
Williams Yeah, we're, we're in a heading select to the right

21:39:58
Tafuri And

21:40:01
Tafuri And American uh, we're thirty-eight miles north of Cali and you want us to go to Tulua and then do the Rozo uh, to the uh Runway right, One One, One Nine?

21:40:11
ATC Kay the RO, you, you can land it, Runway One Niner, you can use Runway One Niner, what is your altitude and the DME from Cali?

21:40:21
Tafuri Okay, we're thirty-seven DME at ten thousand feet

21:40:24
Tafuri You're okay, you're in good shape now . . .

21:40:26
Tafuri We're headin', headin' the right direction, you wanna

21:40:27
ATC Report at five thousand on a final to One One, Runway One Niner

21:40:29
Tafuri *Oh shit. you wanna take the One Nine yet?*

21:40:34
Tafuri Come to the right, come, come right to Ca, Cali for now, kay?

21:40:34
Williams Uh, yeah

21:40:37
Williams Okay

21:40:40
Tafuri *It's that fuckin' Tulua I'm not getting for some reason*

21:40:44
Tafuri *See I can't get, okay now, no, Tulua's fucked up*

21:40:48
Williams Okay, yeah

21:40:49
Tafuri But I can put it in the box if you want it

21:40:52
Williams No, I, I don't want Tulua, let's just go to the extended centerline of uh

21:40:55
Tafuri Which is Rozo

21:40:56
Williams Rozo

21:40:56
Tafuri Why don't you just go direct to Rozo then, alright, I'm gonna put that over ya. . . .

(emphasis added). The undeniable conclusion left by this dialogue is that while the pilots may well have believed they could locate and intercept the published route, they also recognized that they were not yet on that route. No reasonable juror, when confronted with Williams' query of "[p]ress on to where though" in response to Tafuri's instruction to "press on," or Tafuri's observation "[w]here're we going . . . we got fucked up here didn't we?"—followed by Williams' rejoinder "Yeah"—or other similar statements, could come away with the idea that the pilots genuinely believed they were established on the published route. Moreover, if indeed the pilots believed they were on the published route, many of their comments seem curious indeed. For example, during a two minute span near the end of the flight, Tafuri suggested that the aircraft fly direct to Tulua (21:39:07), then suggested that the aircraft fly direct to the Cali VOR (21:39:46) and later suggested that the plane fly direct to Rozo (21:40:56). Not only are these waypoints critical guideposts on the Rozo 1 STAR and VOR DME Rny 19 approach that the pilots unquestionably knew had not been touched, Captain Tafuri's shifting instructions are wholly incompatible with the Defendant's speculation that he genuinely believed Flight 965 was following the published route to the airport.

The CVR transcript not only makes clear that the pilots realized they were off the published route, but also indicates that the pilots did not even know precisely where they were in the sky.[23] American has conceded that Tafuri and Williams were expected to be aware of the true position of the aircraft with respect to the published approach route and, more specifically, the airport, the Tulua VOR and the Rozo NDB. *See* PTS, § V at ¶¶ 53-54. In addition, the pilots were required to "be aware of the actual position of the aircraft relative to the highest terrain obstacle in the area." *Id.* at ¶ 49. The CVR provides little, if any, support for the view that the pilots discharged these basic navigational duties.

American's response to these issues is not convincing. First, it suggests that comments like "where are we headed now" (21:38:58) may reflect nothing more than an attempt to clarify the heading of the aircraft. But the aircraft's heading, as noted above, is made absolutely plain on multiple instruments in the cockpit. Second, the Defendant suggests that comments like "[w]here're we going . . . we got fucked up here didn't we?" . . . "Yeah," simply are part of the process of reconciling conflicting information. Even leaving aside the Defendant's failure to articulate quite what this suggestion implies, American never identifies the information that, at this particular point in time, might have led the pilots to believe the plane was actually on course. Third, the Defendant highlights Tafuri's comment at 21:40:24: "You're okay, you're in good shape now." Arguably this remark can be read as an indication that Tafuri, at least, believed the plane was on or very near the published route. But given the Captain's other comments, as well as his subsequent unsuccessful attempt to locate Tulua (which he knew now to be significantly to the north of the aircraft), it is far more likely that Tafuri was doing nothing more than encouraging his co-pilot,

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[23] Noe, in fact, has testified that as early as 21:37:29, when the pilots sought permission to go "direct to [Tulua, according to American]—despite actually being adjacent to Tulua—Captain Tafuri "doesn't know exactly where he is in the sky." PSC Mot., exh. 21, at 152.

or urging him to follow a path that eventually would lead the aircraft to the published route. In any event, while certain inferences may seem more plausible when the pilots' remarks are taken in isolation, read as a whole, against the backdrop of all of the objective evidence telling the pilots how off course they were, it strains credulity too far to say (and American says just this) that never, not even for a moment, did the pilots doubt they were adhering to the route they were assigned to follow.

American places a great deal of emphasis on the supposition that the pilots genuinely believed they were cleared to 5000 feet by the ATC's instruction to "report Tulua on uh, twenty-one uh, miles uh, five thousand feet" at 21:37:46. The record may well be susceptible to this inference—at 21:38:01, Tafuri answered "That's right" when asked by Williams "Okay, so we're cleared down to five now?"—but we find it of little moment. As American concedes, the possibility that the pilots believed they had been cleared to descend as low as 5000 feet would not make the pilots' continued descent any less reckless if there came a point where the pilots knew that Flight 965 was off course:

> Court: So *even if the ATC had clearly told them they could descend to 5,000 feet, and if they took it that way*, the conduct would still be reckless if they knew they were off course and they continued to descend at night into the Cali region.
>
> Counsel: *Yes*.

Tr. of August 25th Hrg., at 65 (emphasis added). Even without this plain concession, no reasonable juror could accept the proposition, based on the materials in this record, that even if the pilots knew they were off course to the south of Tulua and east of the airway, knew they were in an area of critical terrain and knew it was night, they nevertheless might have genuinely believed that their continued descent was not likely to result in harm because they thought the ATC had given them

permission to descend to 5000 feet after they sought approval for going "direct to Rozo."

American also emphasizes the undisputed fact that the pilots never informed the ATC that Flight 965 was lost or off course. Nor did the pilots ever declare an emergency, which American Airlines policy requires in certain situations when a pilot is aware of being lost. *See* PTS § V ¶¶ 77, 78. But these facts do not lend a great deal of support to the Defendant's position. There may be any number of reasons why the pilots, even if they believed they were off course, did not declare an emergency or seek the assistance of the ATC (especially if they knew that the ATC at Cali could not track them on radar). Perhaps the most plausible explanation is that pilots always believed they could solve any navigational problem on their own. But it is the very essence of recklessness to persist in attempting to navigate your way through a potentially dangerous situation when you know the safest, and indeed mandatory, step is to retreat. The critical, and ultimately fatal, error by the pilots of Flight 965 was their deliberate decision to continue to descend as they undertook the task of restoring the aircraft to the published route. And the test for subjective recklessness does *not* require proof that the pilots intended to kill themselves or the passengers; it simply requires a showing that the pilots recognized that their intentional acts created a significant risk of harm.

C.

To summarize, no reasonable juror, presented with the record before this Court, could find that the pilots' decision to continue the aircraft's descent despite being significantly off course, at night, in an area known for dangerous terrain, did not constitute the intentional performance of an act " 'with knowledge that the . . . act will probably result in injury or damage' " or an act performed in " 'reckless disregard of the consequences,' " as we construe that phrase. The facts and inferences suggested by the Defendant simply lack the measure

of persuasiveness that might permit a jury to enter a verdict for American Airlines, at least with respect to this crucial issue. As a result, the Plaintiffs are entitled to a determination that the pilots of Flight 965 demonstrated "willful misconduct" as that standard has been interpreted by the binding precedent of this Circuit.

In reaching this conclusion, we do not mean to suggest that there are no other acts that might support the entry of judgment as a matter of law on willful misconduct. First, as noted above, it is an extremely close question whether this record contains evidence of the kind of quality and persuasiveness that might permit a reasonable jury to accept American's explanation of why the pilots sought to take Flight 965 "direct to Rozo."[24] Second, the pilots' failure to verify that "R" was in fact the identifier for the Rozo NDB was concededly neg-

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[24] The Defendant asserts that, even assuming the pilots really did intend to bypass Tulua and fly direct to Rozo, a reasonable jury could find that this decision does not rise to the level of recklessness, because the difference between the two routes was relatively small, the valley was wide enough to accommodate the alternative path and the likely time savings was minimal. This argument is not entirely convincing. As the PSC emphasizes, due to the hazardous terrain in Latin America, pilots flying into Latin American airports like Cali are instructed not to deviate from the applicable published STAR except under certain circumstances not applicable here. Indeed, the printed flight plan for Flight 965 contains the express warning: "CRITICAL TERRAIN EXISTS DURING THE DESCENT. STRICT ADHERENCE TO THE STAR NECESSARY FOR TERRAIN CLEARANCE." PSC Mot., exh. 4. The Pilot Reference Guide similarly states that pilots should accept an abbreviated procedure only if, among other things, "the sun is shining," which it was not at 21:37:28 on the night of December 20, 1995. The importance of adhering to the STAR in mountainous terrain is not just to ensure that the aircraft maintains a "horizontal" margin of safety, but also to ensure that the aircraft has sufficient "vertical" clearance to avoid a collision during the descent. In this instance, the slight bump to Tulua before rejoining the 193° radial is designed to keep incoming aircraft in the center of the valley as they navigate two tall peaks. For this reason, if indeed the pilots intended to abbreviate the STAR by going direct to Rozo, the danger of this maneuver should have been plain, and the deviation from American Airlines' policy far more than "de minimis."

ligent and at least arguably reckless. American Airlines training specifically requires that, before a waypoint is executed into the FMC, it must be discussed among the pilots. *See, e.g.*, PSC Mot., exh. 25, McFall dep., at 683-84, 806-08. The Defendant asserts that since the twelve "R" 's that appeared on the CDU screen are listed in order of proximity to the aircraft, and the second "R" was not in the Northern Hemisphere, it was understandable why one of the pilots simply executed the first "R". But if the pilots had discussed or attempted to verify what they were doing, and investigated various clues, including the difference between the latitude and longitude of the Rozo NDB (as reflected on the charts) and the latitude and longitude for the initial "R" (as it appeared on the CDU screen), they would have realized that "R" was not the correct identifier.

Third, it is difficult to accept the Defendant's argument that the pilots did not act recklessly by, in the final two minutes of the flight, abandoning their effort to fly to Tulua without obtaining clearance to do so from the ATC. FAR § 91.193 states that "[w]hen an ATC clearance has been obtained, a pilot in command may not deviate from that clearance, except in an emergency, unless that pilot obtains an amended clearance." In addition, "[e]xcept in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised." PSC Mot., exh. 27. The PSC contends that, once the pilots realized they had missed Tulua, and observed that the aircraft had traveled so far to the southeast that Tulua was actually a left turn, Tafuri, at least, made the decision to turn right and simply skip Tulua, as evidenced by the instructions "Let's go to Cali first of all" (21:39:42) and "go direct CLO" (21:39:46). American's rejoinder to this point, other than its suggestion that the pilots were simply trying to ensure they were fully aligned with the 193° radial, is that the ATC did subsequently give the pilots permission to bypass Tulua, when he answered Tafuri's question at 21:40:01—"you want us to go to Tulua and then do the Rozo uh, to the uh Runway right, One One, One

Nine?" with the response "Kay the RO, you, you can land it, Runway One Niner, you can use Runway One Niner . . . . Report at five thousand on a final to One One, Runway one Niner." We think it unlikely that a reasonable jury could construe this exchange as relieving Flight 965 of its obligation to pass over Tulua, or conclude that the continued right turn was merely negligent as opposed to reckless given the aircraft's location at the time. To begin with, the pilots did *not* ask for permission to bypass Tulua; rather, they asked whether the ATC wanted Flight 965 to go to Tulua and "do the Rozo" arrival before approaching to Runway 19. Similarly, the ATC, in response, did not give Flight 965 permission to bypass Tulua; even if we construe "Key the RO" as something other than an affirmation of precisely what the pilots asked—"you want us to go to Tulua and then do the Rozo uh, to the [Runway 19]?—the ATC simply reminded the pilots that they could land the aircraft on Runway 19 and were obliged to report at 5000 feet. Nor did the ATC "forgive" the pilots' failure to report at Tulua, especially since (contrary to American's suggestion), the pilots never expressly informed the ATC that Flight 965 was then south of Tulua.

We go through this brief summary of the pilots' other errors simply to underscore that there are multiple acts that arguably might support the entry of summary judgment on the question of willful misconduct. In a different case, under different circumstances, summary judgment might be appropriate on the basis of any of these acts. Indeed, there is case law suggesting that a finding of willful misconduct may be premised on the aggregation of a series of improper acts, even if none of the acts, standing alone, seems reckless. *See, e.g., In re Aircrash Disaster, Polec v. Northwest Airlines, Inc.*, 86 F.3d 498, 545 (6th Cir. 1996) (citing *Butler* and *Tuller* and noting that "[n]o principle of law or logic requires a jury evaluating willful misconduct to focus exclusively on discrete acts, without regard for the complete chain of events leading to the accident . . . [e]specially . . . if those acts, though individual, nevertheless reflect an overall frame of mind or course of

conduct which led to them"). We emphasize, however, that our ruling does not turn on an aggregation of merely negligent acts. Nor does it turn on any abiding sense that errors of the frequency and magnitude apparent from this record must, when viewed in their entirety, demonstrate willful misconduct. In evaluating the PSC's motion, we have looked with an especially forgiving eye at the stream of inferences suggested by American Airlines, and have searched carefully for any fair, honest and plausible grounds to allow this litigation to proceed to a jury trial. As a result, it may be that we have been generous to the Defendant with respect to some of the pilots' errors. But one of these grievous errors—their continued descent from a position that was radically off course at night in an environment where the risk from high terrain was palpable and profound—was so plainly reckless, so dangerous, so extreme a violation of the standard of care and so directly responsible for the collision with the mountain—that even allowing the Defendant every benefit of the doubt, the law requires that summary judgment be entered for the Plaintiffs on this basis alone.

D.

Before closing this portion of our analysis, we note the Defendants' reliance on *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2nd Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), a case arising out of the Second Circuit. While at first blush there are some parallels between that case and the litigation before us, the Second Circuit's opinion is distinguishable on legal and factual grounds. *Berner* concerned an airplane that crashed into a mountain near San Francisco while attempting to land. The plaintiff sought to hold the carrier responsible for willful misconduct within the meaning of the Warsaw Convention, arguing that the pilot commenced the landing without receiving the proper signals. A jury returned a verdict for the carrier, but the district court subsequently entered a judgment n.o.v., finding the

carrier liable for willful misconduct and ordering a new trial on damages. The court of appeals reversed this ruling. Initially, the panel observed that the district court erred by applying a definition of willful misconduct that did not require proof that the actor realized that damage was likely to result from his conduct—a requirement under the law of the Second Circuit. *Id.* at 536-37. The panel then explained that it was far from clear whether the pilot's attempt to land the plane without having obtained the proper clearance was done with an understanding that harm was likely to result. According to the court, the defendant had presented sufficient evidence to support the jury's apparent conclusion that the pilot truly believed he was in the proper location to commence the landing. Although there was evidence to support the plaintiffs's view that the pilots must have recognized that they did not receive the proper signals, and therefore should not have attempted the landing, this evidence was not sufficiently unequivocal, rendering the district court's order nothing more than a substitution of its judgment for that of the factfinder. *Id.* at 538.

There are three critical distinctions between *Berner* and the case at bar. First, this Court is bound to follow the definition of "willful misconduct" adopted by the Eleventh Circuit in *Butler*, not the definition applied in the Second Circuit or elsewhere. As noted above, under *Butler*, a plaintiff may establish willful misconduct by proving that the defendant's employees acted with "reckless disregard for the consequences," a standard that can, but need not, be established by a showing that the employees committed an extreme deviation from the standard of care under circumstances where the danger was plain and obvious for all to see. Second, while in *Berner* it was unclear whether the pilot's conduct even constituted negligence, *id.* at 538, here there can be no genuine dispute the pilots of Flight 965 committed multiple breaches of the standards of care in the face of myriad clues that made altogether obvious the danger of their acts. Moreover, while in *Berner* there was evidence suggesting that radio commu-

nication trouble may have interfered with the transmission of the necessary signals, *id.*, here there is no argument that the raw data navigational instruments in the cockpit, or the charts consulted by the pilots, gave them an incorrect portrait of their location after they veered off the published approach. Third, in the case at bar the undisputed facts, especially the CVR transcript, make plain that no reasonable juror could find that the pilots did not apprehend that they were off course as they continued their descent into the mountainous terrain surrounding the Cali airport. For all of the foregoing reasons, *Berner* does not in any way require the submission of the PSC's claims to a jury.

VI.

Having concluded that no reasonable juror could disagree that American Airlines is responsible for willful misconduct, as that term is defined in *Butler*, we turn to the related issue of causation. The Defendant essentially asserts that a reasonable juror could conclude that the misconduct of third parties, specifically Jeppesen, Honeywell or the Colombian air traffic controllers, constituted the sole proximate causes of the crash, thereby relieving American of any responsibility for its misconduct. This argument, we conclude, reflects a basic misunderstanding of the concept of proximate cause.

For the Convention's limitation of liability provision to be lifted, a plaintiff must show that the acts of willful misconduct caused his alleged injuries. *See, e.g., Johnson v. American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987). Although there is relatively little case law discussing the operation of causation principles in Warsaw Convention cases, these principles are fairly well settled in other areas of tort law. As American acknowledges, an inquiry into causation requires a two-step analysis. First, the court must determine if the act was the actual, or "but for," cause of the injury. The Defendant does not contest, and indeed has acknowledged, that the allegedly wrongful acts identified by

the Plaintiffs were among the actual causes of the crash. *See, e.g.*, Tr. of August 19th Hrg., 1997, at 31-34; Tr. of August 25th Hrg., at 74-75. Even without this concession, no reasonable juror could not find "but for" causation. If the aircraft had not descended from approximately 17,000 feet above MSL to under 8500 feet above MSL during the four minutes that elapsed after it veered off course into mountainous terrain to the south and east of Tulua, the collision near the summit of El Deluvio, a mountain peak situated well northeast of the airport, at an altitude of 8900 feet, would not have occurred.

Second, the court must ask if the act was the proximate, or "legal," cause of the injury. *See, e.g., Perera Co., Inc. v. Varig Brazilian Airlines, Inc.*, 775 F.2d 21, 23 (2nd Cir. 1985). A proximate cause is often described as one that " 'in natural and continued sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred.' " *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. Unit B 1981) (citation omitted). An action need not be the sole cause of the plaintiff's injury to qualify as a proximate cause; rather, "[i]t need only be a substantial factor in producing the injury if the injury was reasonably foreseeable at the time of the wrongful act." *Cheng v. United Airlines. Inc.*, 1995 W'law 421157 at *3 (N.D. Ill. 1995).[25] As this comment suggests, proximate cause is "defined in terms of foreseeability." *Sosa*, 646 F.2d at 993. In other words, a "negligent act is not the proximate cause of a loss that results from the intervention of a new and independent cause that is not reasonably foreseeable. However,

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[25] The PSC acknowledges that the conduct of other entities "contributed" to the crash. But American's suggestion that "[t]his concession alone bars the entry of summary judgment" is both unsupported and incorrect. To begin with, the fact that conduct "contributes" to an accident does not necessarily make that conduct a proximate cause of the plaintiff's injuries. Moreover, as *Cheng* indicates, there may be more than one proximate cause of an accident. As noted below, issues concerning the relative culpability of various parties whose acts "contributed" to the demise of Flight 965 can and should be litigated separately.

where the intervening act is probable or foreseeable, [the] causal connection is not broken." *Id.* (citations omitted).

American first insists that questions of proximate cause are always reserved for a jury, and cannot be resolved on summary judgment. As a general rule, proximate cause is an issue that typically may not be susceptible to determination as a matter of law. But courts have recognized that this issue, like all others, may be appropriate for resolution at the summary judgment stage if a reasonable juror could reach only one conclusion. As a district court observed in connection with a Warsaw Convention claim, while "[q]uestions of proximate cause are ordinarily treated as questions of fact," these questions can and should be decided as a matter of law if no genuine issue remains in dispute. *Margrave v. British Airways*, 643 F. Supp. 510, 513-14 (S.D.N.Y. 1986) (entering summary judgment in favor of a carrier and noting that no reasonable juror could conclude that the carrier's conduct proximately caused the plaintiff's injuries).

American next maintains that a reasonable juror could conclude that the acts of misconduct by the pilots were foreseeable to Jeppesen and Honeywell, and therefore these parties, not American Airlines, are wholly responsible for the Plaintiffs' injuries. As it has throughout the latter stages of this litigation, American attempts to shift the focus away from the conduct of its employees and toward the FMC and the database. American contends that while all of the available Jeppesen charts indicated that "R" was the proper identifier for the Rozo NDB, the Jeppesen-manufactured database linked the identifier "R" to the waypoint known as Romeo in the direction of Bogota. American asserts that Jeppesen engineers "had been aware of this design defect in their database for many years," but continually postponed taking steps to remedy the problem. The Defendant adds that Honeywell, like Jeppesen, knew about the problem of so-called duplicate identifiers, but knowingly incorporated the defective database into the FMC, failed to warn carriers like American about the

problem and failed to expose Jeppesen's unwillingness to remedy the situation.

Even leaving aside the question of whether a reasonable juror could conclude that Jeppesen and Honeywell should have foreseen that, as a result of their failure to correct or warn about the alleged defect in the database, the pilots would continue to descend into the mountains once they were off course, the Defendant's argument is fundamentally flawed. The fact that the subsequent behavior of the pilots may have been foreseeable to Jeppesen and Honeywell might preclude these entities from arguing that the pilots' conduct was an intervening, superseding cause of the crash in the event the victims attempt to hold them liable for their injuries. In *Worthington v. United States*, 21 F.3d 399 (11th Cir. 1994), for example, the Eleventh Circuit concluded that any negligence on the part of an airplane pilot who crashed his aircraft while attempting to land at a fog-bound airport did not vitiate the negligence of the air traffic controllers who failed to supply accurate details regarding the prevailing weather conditions. The court explained that "[s]patial disorientation and the failure to successfully execute a missed approach are precisely the harm that this defendant should have expected after depriving (the pilot] of accurate and timely information about weather conditions when he approached a landing strip shrouded with fog." *Id.* at 406. But it certainly does not follow that American Airlines can point to the *prior* misconduct of Jeppesen and Honeywell as a basis for exonerating it from responsibility for all subsequent, foreseeable acts of willful misconduct by its employees. Indeed, *Worthington* contains absolutely no suggestion that the pilot could not have been held liable for any of his acts that breached the. relevant standard of care and proximately caused the plaintiffs' injuries. We are aware of *no* case, in the context of the Warsaw Convention or an ordinary tort claim, that has endorsed the backwards proximate cause analysis put forward by American. As the Supreme Court explained in *Exxon Company, USA v. Sofec, Inc.*, — U.S. —, 116 S. Ct. 1813 (1996), the concept of

superseding cause applies " 'where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a *later* cause of independent origin . . . ' " (emphasis added) (citation omitted).

Perhaps recognizing its dilemma, the Defendant asserts that a jury could conclude that the degree of misconduct attributable to Jeppesen and Honeywell so outweighs any misconduct by American that it would be unjust to hold American responsible for all of the Plaintiffs' compensatory damages. The Defendant adds that while Jeppesen and Honeywell had years to correct their errors, the pilots of Flight 965 had only minutes to respond to the unexpected left turn attributable to the anomaly concerning the identifier for the Rozo NDB. This theory fails on several levels, though. First, we are aware of no case substituting what amounts to a search for the single entity most responsible for an accident for the foreseeability analysis required by the jurisprudence of proximate cause. American relies principally on comments by the Eleventh Circuit in *Worthington*, where the panel quoted the following language from a ruling by a Florida intermediate appellate court:

> Florida courts, in accord with courts throughout the country, have for good reason been most reluctant to attach tort liability for results which, although caused-in-fact by the defendant's negligent act or omission, seem to the judicial mind highly unusual, extraordinary, bizarre, or stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence. Plainly, the courts here have found no proximate cause in such cases based solely on fairness and policy considerations, rather than actual causation grounds.

21 F.3d at 405 (citation omitted). Notwithstanding the potential sweep of this passage, *Worthington* itself recognizes that the proximate cause inquiry is more channeled than a free-wheeling attempt to allocate liability among prior and sub-

sequent tortfeasors based on amorphous notions of "fairness and policy." Indeed, the Florida case cited by the panel simply held that a subsequent tortfeasor's acts were " 'so far beyond the realm of foreseeability that' " no liability could be imposed on the earlier tortfeasor. *Id.* Familiar tort law concepts of contribution, comparative fault and apportionment may provide the Defendant with a vehicle to litigate the relative culpability of Jeppesen, Honeywell and other entities. But if the misconduct attributable to American Airlines was a substantial factor in bringing about the demise of Flight 965, and the aircraft's eventual fate was neither bizarre nor unforeseeable, then the possibility that the prior acts of other entities contributed to the accident is of no moment, even if those entities seem more blameworthy than the single Defendant the Plaintiffs have chosen to sue.

Nor are we persuaded that any wrongful acts by the Colombian ATC's make the conduct of the pilots any less a "substantial factor" in causing the Plaintiffs' injuries. The Defendant asserts that the ATC's made a series of errors that proximately caused the crash. American specifically alleges the following misconduct: (1) the failure of the ATC at Bogota to inform the ATC at Cali that the aircraft was flying on a direct clearance to the Tulua VOR; (2) the Cali ATC's "haphazard use of terminology"; (3) the Cali ATC's failure to make absolutely clear that Flight 965 was supposed to fly to Tulua not Rozo; (4) the Cali ATC's "repeated[ ] diver[sion] by personal (non-ATC) business"; and (5) the Cali ATC's failure to recognize the significance of the cockpit's report that the aircraft had traveled only one mile closer to the Cali VOR over an almost two-minute span. Def. Resp., at 86-89. As a result of these alleged errors, American maintains, the Cali controllers did not recognize that Flight 965 was off course, and took inadequate measures to ensure the safe landing of the aircraft. As one of the Defendant's experts put it, "[i]n my opinion had the controller been paying full attention to his duties, he would have noticed several items in the transmission from 965 that should have alerted him to react positively

and prevent the accident from happening. . . . [There were] red flag[s] to alert him that there was something out of kilter and he should have done something to correct it." Hugonnett dep., at 21-22.

There are significant flaws in American's position. To begin with, several of the allegedly wrongful acts highlighted by American occurred before the pilots of Flight 965 elected to continue their descent even though it was obvious that the aircraft was off course. For example, the fact that the ATC could have said "fly via Tulua" instead of "Report Tulua" when the pilots were programming the plane to fly directly to Rozo does not in any way operate to excuse the pilots' *subsequent* decision to continue their descent once they knew or plainly must have known they were off course (especially if we accept American's theory that only at the very end of the flight did the pilots deviate from their intention to pass over Tulua)—Moreover, the possibility that the ATC's did not do what the pilots obviously should have done *themselves*—"verify the exact location of the aircraft"—is not, on this record, the kind of intervening act that completely breaks the causal chain and wholly cuts off the liability of American Airlines.[26] But even assuming *arguendo* that a reasonable jury could find that any acts of misconduct by the Colombian ATC's occurred subsequent to all of the misconduct attributable to American, and were of sufficient egregiousness to supplant the pilots' recklessness, the record makes abundantly clear that the perceived inadequacies of Colombian air traffic controllers were known by and altogether foreseeable to the Defendant. To reiterate, the subsequent conduct of another actor may be a superseding cause only when that conduct is not foreseeable at the time the defendant engages in its misconduct. As

[26] There is some inconsistency in American's view that while the Cali ATC—when informed that the aircraft had moved just one mile closer to the Cali VOR despite flying at over 250 knots for close to two minutes—plainly should have been alerted that something was "out of kilter," a reasonable jury could infer that the pilots, although they expressly reported this fact to the ATC, reasonably failed to grasp its significance.

quoted at length above, however, Tafuri and Williams, like all American Airlines pilots flying into Latin America, were specifically instructed that "[i]f the airport is in high terrain, you are best advised to *assure the controller will become distracted and allow you to fly into a mountain*." PSC Mot., exh. 8, at 63 (emphasis added). Consequently, pilots must "*never rely on terminal controllers to keep you from hitting mountains*." *Id.* (emphasis added). Pilots are expected to know that "when the controller issues a clearance for descent, it will normally be based upon the controller's assumption that you are taking charge of your own terrain separation. *The burden rests squarely upon you*." *Id.* at 78 (emphasis in original); *see also id.*, at 72 ("You should never entrust yourself to a controller in mountainous terrain in (Latin] America"); *id.*, exh. 18, Rauhofer dep., at 81-82.[27] In short, American Airlines, training materials make abundantly clear that pilots flying into airports like Cali—for reasons of language, technology and training—must be wary of relying on the assistance of local ATC's, and simply should not expect local ATC's to "correct," "prevent," or even point out, navigational errors made by the pilots. Tafuri and Williams were squarely on notice that no matter what the ATC did or did not advise them about their position in the sky, it was ultimately *their* responsibility to take all necessary steps to ensure the safe descent of the aircraft. This may well have been why the pilots made little or no effort to contact the ATC's on their own initiative

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[27] The Defendants' expert, Jeff Noe, acknowledged at deposition that Tafuri and Williams undoubtedly knew that the enroute radar at the Cali airport had been dysfunctional for some period of time (although he suggested that the pilots somehow "may not have recognized they were not in radar contact"). PSC Mot., exh. 21, at 153-54. Indeed, American Airlines pilots were advised that many Latin American airports lack functioning radar systems, and that therefore Latin American ATC's must rely on the pilots of incoming flights for information about the location of the aircraft. To the extent that the pilots *did* know the radar was disabled, of course, the ATC's inability or unwillingness to inform Flight 965 of the danger of its position, and "correct" the pilots' errors, would have been all the more foreseeable.

during the final minutes of the flight. Accordingly, while the acts and omissions of the Colombian controllers may have contributed to the crash, they do not, for a variety of reasons, provide a reasonable jury with a lawful basis to find that any misconduct by the ATC's wholly superseded, and wholly excused, the willful misconduct of the pilots.

VII.

The claims of cabin crew Plaintiffs do not implicate the Warsaw Convention. Instead, pursuant to the parties' agreement, Florida law governs these claims. The cabin crew Plaintiffs are proceeding on a theory of negligence, which in Florida requires proof of four elements: (1) a legal duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach was the proximate cause of the injury. *See, e.g., Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774, 776 (Fla. 5th Dist. Ct. App. 1994), *rev. denied*, 651 So. 2d 1197 (Fla. 1995). No reasonable juror could find that these elements have been not been established here.

Under Florida law, a common carrier generally must " 'exercise the highest degree of care, foresight, prudence and diligence reasonably demanded at any given time by the conditions and circumstances.' " *Krys v. Lufthansa German Airlines*, — F.3d —, 1997 W'law 450150 at *10 (11th Cir. August 25, 1997) (citation omitted). Even leaving aside the principal acts of misconduct specifically highlighted above, virtually all of which demonstrate negligent if not reckless conduct, American has expressly conceded that the pilots breached a duty of care by failing to verify that "R" was in fact the identifier for the Rozo NDB before executing this command in the FMC. *See* Tr. of August 19th Hrg., at 29; Tr. of August 25th Hrg., at 85-86, 88; PTS, at § V ¶ 80 ("[T]he flight crew deviated from safe operating practices they were trained to observe in Latin America in that they failed to cross check and verify whether 'R' was the correct waypoint input for the Rozo NDB"). American has also expressly conceded

that, if the crew had taken steps to verify that "R" was the identifier for the Rozo NDB, the aircraft would not have veered substantially to the left and the accident would not have taken place (either because the crew would have discovered that the identifier for the Rozo NDB was R-o-z-o or, if we accept the Defendant's theory that the pilots never intended to deviate from the STAR, might have realized that the Rozo 1 STAR actually began at the Tulua VOR and typed in the identifier for Tulua). *See* Tr. of August 19th Hrg., at 31-34; Tr. of August 25th Hrg., at 74-75; PTS, at § V ¶69 ("If the flight crew of Flight 965 had properly verified and executed the approach to the airport . . . the accident would not have occurred"). And since that the cabin crew members unquestionably suffered fatal injuries as a result of the crash, there is no genuine issue of material fact as to the first three elements of negligence under Florida law.

What American does contest is the Plaintiffs' belief that the failure to verify "R" was not only an actual cause of the crash, but also one of the proximate causes of the accident. This objection is unpersuasive, for all of the reasons stated above. *See supra*, at 98-108. The fact that the pilots' error may have been foreseeable to Jeppesen or Honeywell does not make American Airlines any less responsible for a plain breach of duty by its employees that occurred subsequent to any breach of duty by these entities. Nor does American's view that the measure of fault attributable to Jeppesen or Honeywell outweighs the measure of fault attributable to the pilots change the analysis. No reasonable juror could find that the pilots' decision to type "R" into the FMC was anything other than a substantial factor contributing to Flight 965's eventual collision with a mountain during its attempted approach to the Cali airport. Moreover, the collision was an entirely foreseeable consequence of the pilots, misprogramming of the computer as they began to descend into the mountainous terrain surrounding the airport. Florida courts, like their federal counterparts, recognize that disputes about causation may be resolved at the summary judgment stage when

reasonable jurors could reach only one conclusion as to proximate cause. *See, e.g., McCain v. Florida Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992) (reaffirming the maxim that judges may decide questions of proximate cause only "where the facts are unequivocal," in other words, "where the evidence supports no more than a single reasonable inference"). Indeed, Florida courts have done so in aircrash cases analogous to the one at bar. *Independent Air, Inc. v. Tosini*, 600 So. 2d 3, 4 (Fla. 3d Dist. Ct. App.) (affirming trial court's entry of summary judgment in case involving an aircraft that collided with a mountain after the pilot knowingly descended the plane below the safe minimum altitude, notwithstanding the carrier's claim that the ATC directed the pilot to make the descent and gave him an incorrect altimeter setting), *rev. dismissed*, 613 So. 2d 5 (Fla. 1992).

American also suggests that summary judgment may not be entered against it because there remains a dispute about the Defendant's worker's compensation immunity with respect to the crew members. The crew members have come forward with an affidavit from an expert who states unequivocally that since American "has not made payments of benefits pursuant to the Florida Workers' Compensation Act to the dependents of the crew members, [it] may not avail itself of the statutory immunity set forth in § 440.11." Aff. of Ramon Malca, Feb. 10, 1997, at ¶7. American has, to date, come forward with no evidence whatsoever contradicting this opinion or the factual premises on which it is based, and even in its memorandum never squarely disagrees with the Plaintiffs' position. Although American does state that it "reserves its right to address workers' compensation issues if and when they arise," Def. Resp., at 18, the law is clear that a party opposing a summary judgment motion may not rest on conclusory denials if the moving party has come forward with evidence suggesting the absence of a fact issue for trial.

American next maintains that the cabin crew Plaintiffs' motion cannot be granted because the motion does not contain a concise statement of undisputed material facts, as required

by Rule 7.5 of the Local Rules for the Southern District of Florida. While the Plaintiffs' initial memorandum does not contain a distinct section clearly identifying the specific facts they believe to be undisputed, the memorandum does catalogue a series of admissions by American Airlines. P'tiff. Mem., at 12-19. More to the point, the crew members' motion expressly adopts the statement of "indisputable" facts submitted by the PSC in conjunction with its application for partial summary judgment. *Id.* at 6 n.1. While we do not diminish the importance of Local Rule 7.5, we find no meaningful prejudice to the Defendant from any non-compliance with this rule by the cabin crew Plaintiffs, especially given the relative narrowness of the dispute in these cases and the abundance of undisputed facts recounted in the joint pre-trial stipulation. Accordingly, we are unwilling to deny the Plaintiffs' otherwise meritorious summary judgment motion solely on the basis of the Local Rule. *Cf. Johnson v. Mortham*, 915 F. Supp. 1529, 1548 (N.D. Fla. 1995) (declining to deny summary judgment motion based on moving party's failure to supply a statement of undisputed material facts, notwithstanding a Local Rule which provided that this omission "constitutes grounds for denial of the motion," where the undisputed facts were apparent elsewhere in the record).

Finally, the Defendant suggests that Florida's apportionment statute precludes the entry of partial summary judgment against it, since a jury must be allowed to determine the relative fault of American Airlines when compared to the fault, if any, of Jeppesen, Honeywell and the Colombian ATC's. Section 768.81(3) of the Florida Statutes essentially provides that judgment may be entered against a tortfeasor whose acts proximately caused the plaintiff's injuries only in an amount that reflects the extent to which the defendant's acts, as opposed to the acts of others, contributed to the injuries. *See, e.g., Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993); *Fabre v. Martin*, 623 So. 2d 1182, 1185-87 (Fla. 1993). The cabin crew Plaintiffs do not dispute that, if American Airlines is found liable on a theory of negligence, an appor-

tionment of fault is required before judgment may be entered in their favor. Nor do the Plaintiffs dispute that summary judgment cannot be entered on this issue at this time. But nothing in Florida law even arguably suggests that the need to apportion fault among various potential tortfeasors can or should dissuade a court from entering summary judgment as to the liability of the one tortfeasor named as a defendant in the lawsuit. Accordingly, the prospect of subsequent proceedings relating to apportionment does not create an issue of fact concerning the discrete issue of whether the conduct of American Airlines' employees on the night of the crash breached the standard of care and proximately caused the death of the members of the cabin crew.[28]

We note, at this point, American's suggestion that the Florida apportionment statute applies not just to the cabin crew cases, but also to the Warsaw Convention claims of the passengers. This argument warrants little discussion. We are aware of no case in this or any other Circuit suggesting that a state apportionment statute affects the determination of an air carrier's liability for an injured plaintiff's compensatory damages under the Warsaw Convention. American's position apparently rests on the notion that, under the Supreme Court's decision in *Zicherman v. Korean Air Lines, Inc.*, — U.S. —,

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[28] In light of our conclusion that the passenger Plaintiffs, like the cabin crew Plaintiffs, are entitled to summary judgment on liability, the liability trial scheduled to begin on September 16, 1997 shall be cancelled. Accordingly, we need not devote further discussion to whether the issue of apportionment in the six crew cases should be tried at the same time as the passenger Plaintiffs' Warsaw Convention claims. Nevertheless, as indicated during the August 25th hearing, questions concerning the potential responsibility of Jeppesen, Honeywell and others are more sensibly addressed in conjunction with the trial of American's pending third party contribution claims. While the effect of postponing resolution of the apportionment issue may be to delay the entry of judgment in the cabin crew cases, principles of economy and efficiency weigh in favor of resolving all matters concerning the conduct of third parties in a single proceeding, especially since Jeppesen and Honeywell—having been joined to this litigation at so late a juncture—are not now in a position to protect their interests adequately.

116 S. Ct. 629 (1996), the Convention is nothing more than a "pass-through" statute that requires application of the law of the forum state on the question of apportionment. Def. Resp., at 90 n.157. To begin with, this argument is difficult to square with American's insistence, in opposition to the PSCIs recent motion for leave to add punitive damages claims, that the Convention is not a mere "pass-through." The Court agreed with American's view in the course of denying the Plaintiffs' motion to amend:

> [T]he PSC contends that *Zicherman* stands for the proposition that the Warsaw Convention, and specifically Article 17, is nothing more than a "pass-through" statute for purposes of determining the recoverable damages. This may be an overstatement. The Supreme Court's comment on this point is contained the following passage:
>
> > As we have discussed, the Convention itself contains no rule of law governing the present question; nor does it empower us to develop some common-law rule . . . that will supersede the normal federal disposition. Congress may choose to enact special provisions applicable to Warsaw Convention cases, as some countries have done. Absent such legislation, however, Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention.
>
> 116 S. Ct. at 636. Thus, the Court's reference to the Convention as a "pass-though" was expressly limited to 'the present question," *i.e.* loss of society damages. Moreover, the PSCIs argument cannot readily be squared with the Supreme Court's 1991 decision in *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991), which reversed the Eleventh Circuit by holding that the express language of Article 17, as well as the negotiating history, forbids recovery for purely psychic injury. This holding was not disturbed by *Zicherman*, and supports the view that the Convention

> operates as a "pass-through" with respect to damages only where it does not embody a particular "rule of law" on the recoverability of the damages in question.

Order of August 25, 1997, at 9-10. The scheme of liability created by the Warsaw Convention contemplates that a carrier will be liable for all "damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger . . . ." American has pinpointed no language from the text of the treaty or from the negotiating history which can be read to suggest that the amount of money a passenger may recover from a carrier for the "damage sustained" as a result of that carrier's misconduct must be reduced to reflect the carrier's proportionate percentage of fault. There are other flaws with the Defendant's position. American never articulates quite why it believes Florida law would apply across the board on the issue of apportionment of fault, especially since some of the cases pending before this Court did not originate in a Florida forum. Moreover, it is far from clear (although we offer no opinion on this issue at this time) that under Florida law a defendant held responsible for behavior amounting to "willful misconduct" can seek apportionment with respect to another potentially responsible actor. The principal case cited by American, *Stellas v. Alamo Rent-A-Car*, 673 So. 2d 940 (Fla. 3d Dist. Ct. App.), *rev. granted*, 683 So. 2d 485 (Fla. 1996), simply concludes that a *negligent* defendant may seek an apportionment of fault with respect to a non-party intentional tortfeasor whose acts contributed to the plaintiff's injuries. *Id.* at 942-43. For purposes of comparison, Florida law indicates that an *intentional* tortfeasor may not seek to apportion its fault. Fla. Stat. 768.81(4) (stating that the apportionment provision "applies to negligence cases" and "does not apply to any action . . . based upon an intentional tort").

VIII.

For all of the foregoing reasons, we conclude that both the passenger Plaintiffs and the crew Plaintiffs are entitled to summary judgment on the issue of liability. The crew members' entitlement to summary judgment is clear, and the Defendants' objections give us little pause. The PSC's motion, however, raises more troubling questions, principally because the result that it seeks—a finding that the pilots of Flight 965 demonstrated willful misconduct as a matter of law—is unusual and carries tremendous consequences for the litigation. It would be easy enough for us to look at the complicated and lengthy record in this lawsuit, assume that a genuine dispute of material fact must exist as to all of the PSC's theories and compel the Plaintiffs to endure the time, expense and vagaries of trial. But in the end, even after a painstaking scrutiny of the record and having viewed the evidence in the light most favorable to the Defendant, we conclude that the undisputed facts, and the many points conceded by American, simply leave no room for a *reasonable* jury to find that the pilots' deliberate decision to continue to descend the aircraft from an off course position at night, in an environment known for high terrain, and despite the unequivocal warning of their training that "[m]ost of the aircraft that have hit the mountains [in Latin America] did so because the crew apparently did not know where they were" was anything other than an act of willful misconduct—whether we examine the state of mind of the pilots or simply the myriad clues that told them just how far, and how dangerously, off course Flight 965 had traveled.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the PSC's motion for partial summary judgment on liability, and the cabin crew members' separate motion for summary judgment on liability, are GRANTED. The liability trial scheduled for September 16, 1997 is CANCELLED, and the Defendants' motion for continuance, filed August 26, 1997, is DENIED AS MOOT.

DONE AND ORDERED in Miami, this 9th day of October, 1997.

/s/ STANLEY MARCUS
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

cc:

Howard Barwick
William Burd
Richard Dunn
Aaron Podhurst (for distribution to all Plaintiffs' counsel)
Patricia Howard, MDL Panel

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4739
District Court No. 96-727-CIV
Filed June 15, 1999

DORIS CRISTINA PIAMBA CORTES, Individually and as Personal Representative of the Estate of Maria Constanza Piamba Cortes, deceased,

Plaintiff-Appellee-Cross-Appellant,

—versus—

AMERICAN AIRLINES, INC., a Delaware Corporation,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

Before:

BIRCH and DUBINA, *Circuit Judges,*
and MORAN*, *Senior District Judge.*

---

* Honorable James B. Moran, Senior U.S. District Judge for the Northern District of Illinois, sitting by designation.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgement of the said District Court in these causes be and the same is hereby Affirmed in part and Vacated in part; and that these causes be and the same are hereby Remanded to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

Entered: June 15, 1999
For the Court: Thomas K. Kahn, Clerk

By: [ILLEGIBLE] DAVIDSON
Deputy Clerk

ISSUED AS MANDATE: Aug. 31, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4739
Filed August 18, 1999

DORIS CRISTINA PIAMBA CORTES, individually and as Personal Representative of the Estate of Maria Constanza Piamba Cortes, deceased,

Plaintiff-Appellee-Cross-Appellant,

—versus—

AMERICAN AIRLINES, INC., a Delaware Corporation,

Defendant-Appellant-Cross-Appellee.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before:

BIRCH and DUBINA, *Circuit Judges,*
and MORAN*, *Senior District Judge.*

---

* Honorable James B. Moran, Senior U.S. District Judge for the Northern District of Illinois, sitting by designation. No.

PER CURIAM:

The Petition for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[ILLEGIBLE]
UNITED STATES CIRCUIT JUDGE

Supreme Court U. S.
FILED
DEC 20 1999
CLERK

(2)

No. 99-846

IN THE

Supreme Court of the United States

DORIS PIAMBA CORTES,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RANDAL R. CRAFT, JR.
ALAN D. REITZFELD
HAIGHT GARDNER HOLLAND
& KNIGHT, A LAW OFFICE OF
HOLLAND & KNIGHT LLP
195 Broadway
New York, New York 10007
(212) 513-3200

GRIFFIN B. BELL
BYRON ATTRIDGE
CHILTON DAVIS VARNER
Counsel of Record
PAUL D. CLEMENT
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

Attorneys for Respondent

156864

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

29 pp

QUESTION PRESENTED

Whether, in order to overcome the Warsaw Convention's limitation on liability for damages, claimants must prove that employees of an air carrier subjectively knew their conduct would likely result in harm, an issue as to which the Courts of Appeals are in agreement.

STATEMENT PURSUANT TO RULE 29.6

AMR Corporation owns 100% of the stock of American Airlines, Inc.

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The road to this Court began with a district court's unprecedented decision to deny American Airlines, Inc. ("American") a jury trial by finding as a matter of law on a motion for summary judgment that the actions of the pilots of American Flight 965 constituted "willful misconduct." The district court thereby lifted the Warsaw Convention's[1] $75,000 limitation on liability for damages in lawsuits arising out of the Flight's nighttime accident near Cali, Colombia. *See* App., 122a-123a.[2] Although there was no indication from the cockpit voice recorder that the pilots recognized the aircraft was out of the Cali valley and headed toward a nearby mountain, the court reviewed circumstantial evidence and granted summary judgment against American.

Acknowledging that "state of mind issues are especially difficult to resolve on summary judgment," App., 92a, yet determined to construe the Warsaw Convention's "liability limit as narrowly as possible," App., 103a, the district court

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw on October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105 ("Warsaw Convention"). Article 22 of the Warsaw Convention, as modified by the Montreal Agreement of 1966, limits the amount a passenger is entitled to recover from an air carrier to provable damages not in excess of $75,000. Under Article 25(1), however, passengers are entitled to break through the liability cap if they can prove the conduct that caused their injuries constituted "wilful misconduct." *See* App., 9a-13a (discussing background of the Warsaw Convention). Although the Warsaw Convention uses the spelling, "wilful misconduct," American, like petitioner, will use the more common spelling, "willful misconduct," except where quoted text requires otherwise.

2. For references to the opinions below, American will cite to the Appendix to the Petition for Writ of Certiorari.

crafted a new, purely objective standard to find American liable for willful misconduct. The court held that the circumstances surrounding a crash can be so egregious that a court can find willful misconduct as a matter of law simply because a pilot should have known harm was imminent, even if the pilot was in fact unaware. *See* App., 122a. This test, which precludes the necessity of exploring the actor's subjective state of mind, writes out of willful misconduct not only intent but even awareness or suspicion of the potentially dangerous consequences of the pilot's actions. *See* App., 122a-123a.

This was a singular holding. No court had ever before in a reported Warsaw Convention case displaced the factfinder to determine on summary judgment that those in charge of an aircraft acted in such a willful manner in causing a crash. *See* App., 91a (acknowledging absence of precedent).[3]

On appeal, the Eleventh Circuit Court of Appeals engaged in a thorough examination of the Convention and the tests applied by courts to determine whether "willful misconduct" had occurred. The Court of Appeals noted some ambiguity in the application of the tests applied by some Circuits but identified no split of authority. *See* App., 18a-

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3. The district court alternatively held that willful misconduct had occurred as a matter of law under a subjective standard, even though it conceded there was contrary evidence in the record. *See* App., 133a-134a ("[T]his remark can be read as an indication that [one of the pilots], at least, believed the plane was on or very near the published route."). The Court of Appeals rejected this holding, finding instead that whether the pilots believed they were far enough off course that they realized their actions would probably result in harm to the passengers was a question for the fact finder. *See* App., 33a-36a.

19a. The Court of Appeals reversed the district court, holding that the appropriate test for willful misconduct under the Warsaw Convention was not whether the actor "should have known" his conduct presented a risk of harm but, rather, whether the actor subjectively "knew" his conduct posed a substantial risk of harm. *See* App., 28a-29a. Under the subjective test, the court determined that, although a ***factfinder*** would be entitled to draw such an inference, the evidence did not support a finding ***as a matter of law*** that the pilots in this case knew their actions would likely result in harm to the passengers. *See* App., 35a-36a. The court then remanded the case for a trial on the issue of liability. This was the right result, and there is no reason to re-examine it.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER DEFINITION OF "WILLFUL MISCONDUCT."

A. The Circuits are in Agreement that "Willful Misconduct" Must Be Judged Under a Subjective Standard.

Petitioner's alleged conflict in the Circuits as to the proper standard for willful misconduct is illusory. Prior to this case, the only Circuits squarely to address this issue agreed that a subjective test should be applied, for the airline employee's state of mind was a requisite element of willful misconduct. In 1996, the D.C. Circuit held that "[t]he wrongdoer must ***consciously be aware*** of his wrongdoing." *Saba v. Compagnie Nationale Air France*,

78 F.3d 664, 668 (D.C. Cir. 1996) (emphasis added). Thus, reckless disregard could not be shown simply by proving non-compliance with regulations, persistent lack of judgment, and lapses of common sense. *See id.* at 667-68.

The Second Circuit had recognized this subjective test for willful misconduct much earlier. In 1955, it stated that "[t]here must be a realization of the probability of injury from the conduct." *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955). The Second Circuit later re-affirmed this definition of willful misconduct in *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532, 536 (2d Cir. 1965) ("[T]he [district] court in its opinion was in error in concluding that the Second Circuit does not require knowledge that damage would probably result."); *see also In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 838 (2d Cir. 1994) ("the issue of intent, or state of mind, is crucial in any determination of wilful misconduct").

B. The Senate Report Regarding the Ratification of Montreal Protocol No. 4 Confirms that United States Courts Have Always Required Subjective Knowledge.

While this case was pending, the United States Senate ratified Montreal Protocol No. 4, which replaced the term "willful misconduct" in Article 25 with a description of the requisite misconduct. Under amended Article 25, a passenger is entitled to break through the $75,000 liability cap by showing that his damages resulted from "an act or omission of the carrier, his servants, or agents, done with ***intent*** to cause damage or ***recklessly and with knowledge*** that damage would probably result." Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating

to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20 at 21-32 (1998) ("Montreal Protocol No. 4") (emphasis added).

The definition chosen by the drafters of the relevant language in Montreal Protocol No. 4 to replace the term "willful misconduct" clearly requires knowledge on the part of the actor. Importantly, the Executive Branch agencies which advised the Senate in ratifying the Protocol specifically opined that the definition was based on the interpretation of willful misconduct by United States courts and that the new definition would not change the scope of the standard in this country. *See* S. Exec. Rep. No. 105-20 at 15, 47, 52-53 (change did not modify scope of Article 25 in United States, but merely replaced the term "wilful misconduct" with its ***common law definition*** as arrived at in the courts of this country; modification will not affect United States claimants in cases under the Convention); *see also* Point IV, *infra*. Therefore, those involved in choosing and ratifying the relevant language in Montreal Protocol No. 4 certainly believed United States courts were in agreement that willful misconduct required intent or, at a minimum, knowledge that the actor's conduct would probably produce harm.

C. *Tug Ocean Prince* and *Koirala* are Not Inconsistent with *Piamba Cortes.*

In an attempt to rebut this array of precedent, petitioner has brought forward only two cases to support her argument that the federal circuits are in conflict as to whether Article 25 incorporates an objective or subjective knowledge standard: *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978), and *Koirala v. Thai Airways*

International, Ltd., 126 F.3d 1205 (9th Cir. 1997). Both are appeals from bench trials (not rulings on summary judgment), where the judge was commissioned to find facts.[4] Moreover, in both cases, the Court of Appeals applied a "clearly erroneous" standard of review to the facts and conclusions of the trial court. Neither case contradicts nor erodes the consensus discussed above.

The first, *Tug Ocean Prince*, was not even a case under the Warsaw Convention — a fact that petitioner, in her numerous references to this case, conveniently omits. It involved instead a collision of an oil barge with a rock in the Hudson River. The Court there was called upon to interpret the Water Quality Improvement Act of 1970, as amended by the Federal Water Pollution Control Act of 1972, a statute which the Court of Appeals conceded was "not a model of clarity." *Tug Ocean Prince*, 584 F.2d at 1162. By way of analogy, the Court cited *Pekelis v. Transcontinental & Western Air*, 187 F.2d 122 (2d Cir. 1951), and *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532 (2d Cir. 1965), two Warsaw Convention cases. As described above, *Berner* requires knowledge that damage would probably result. 346 F.2d at 536. *Pekelis*, similarly,

4. This distinction is important. Defendants in those cases were afforded the opportunity to have a factfinder decide the relevant issues at trial — American was not. As the Court of Appeals acknowledged, "circumstantial evidence certainly permits a factfinder to infer that the pilots realized [their actions posed a substantial risk of harm]. This interpretation, however, is not the only reasonable inference that can be taken from this evidence, as the entry of summary judgment requires." App., 35a. Thus, the Court of Appeals decided that a ***factfinder*** should properly decide what inferences, if any, to draw concerning the pilots' awareness under the circumstances at issue, not the court as a matter of law. The cases petitioner cites are in no way at odds with that holding.

requires some form of knowledge and awareness by the actor. 187 F.2d at 124; *see* Point IV, *infra* (discussion of *Pekelis*). In the face of *Pekelis*, *Grey*, and *Berner*, the *Tug Ocean Prince* decision cannot stand for the proposition that the Second Circuit follows an objective test for the determination of willful misconduct under the Warsaw Convention. This is particularly true in light of the Second Circuit's most recent pronouncement on the issue in the *Lockerbie* decision. 37 F.3d at 838 ("Wilfulness as [used in the Warsaw Convention] involves the issue of intent . . . to perform an act with knowledge that it probably will result in injury and with disregard of that probable consequence.").

The second case, *Koirala*, is a Warsaw Convention case in which the Ninth Circuit noted that the determination of "wilful misconduct" and the actor's state of mind requires a factual inquiry. 126 F.3d at 1210. The court in *Koirala* did not endorse an objective test for determining that state of mind. Rather, in affirming the district court's finding that the limitation on liability should be lifted, the Ninth Circuit specifically acknowledged that it was using a ***subjective*** standard: "In view of the cumulative trial evidence, we cannot say the district court clearly erred in finding that the crew acted in ***conscious and reckless disregard*** of their duties, constituting wilful misconduct under the Warsaw Convention." *Id.* at 1212 (emphasis added); *see also id.* at 1211 ("[*S*]***ubjective*** standards are nearly always satisfied by circumstantial proof.").

D. The Circuits Have Not Departed from Prior Precedents in Panel Opinions.

Finally, to accept petitioner's argument that a split of authority exists, one also has to accept that the Eleventh and

D.C. Circuits departed from their prior Circuit precedents in the absence of *en banc* consideration. Petitioner's theory appears to be that the Eleventh Circuit's decision below conflicts with its prior decision in *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), and that the D.C. Circuit's opinion in *Saba* conflicts with its prior decision in *KLM Royal Dutch Airline v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961). In addition, to preserve the incorrect view that the Second Circuit applies an objective standard, petitioner implicitly suggests that the Circuit Court's decision in *Tug Ocean Prince*, a non-Warsaw Convention case, overruled its prior decisions in *Pekelis*, *Grey*, and *Berner*, all Warsaw Convention cases.

This would all be quite incredible. Circuit Court panels do not overrule prior precedent. *See United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."); *see also LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc); *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995). That petitioner's argument requires this Court to believe it happened three times is enough to reject it.[5]

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5. Before deciding that willful misconduct requires an analysis of the actor's subjective state of mind in this case, the Eleventh Circuit examined the tests applied in other Circuits. The court recognized the relatively broad definitions of willful misconduct adopted by certain Circuits in the first round of willful misconduct cases. For example, the Eleventh Circuit in *Butler* and the D.C. Circuit in *Tuller* included reckless disregard within those definitions. Over time, some confusion ensued over whether reckless disregard in this context should be judged by an objective or subjective standard. The *Saba* and now *Piamba Cortes* courts have revisited the issue and clarified that reckless disregard involves subjective

(Cont'd)

The Eleventh Circuit did not create a conflict when it found that "willful misconduct" requires a subjective inquiry into the state of mind of the airline employee; it ***resolved*** one created by the error of the district court. In doing so, the Court of Appeals merely confirmed its alignment with its sister Circuits.

II.

THIS CASE DOES NOT PRESENT A QUESTION WORTHY OF CERTIORARI.

The Supreme Court rules leave little question about the constricted boundaries of the writ of certiorari: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. While undoubtedly of considerable importance to petitioner and American, this case is an anomaly, and it is extremely unlikely indeed that the issues it presents will recur.

(Cont'd)

intent — something the Second Circuit recognized from the beginning in *Grey*, *Pekelis*, and *Berner*. Thus, there has been no overruling of prior panel opinion precedent, and there is no split of authority (although one would have been created had the Eleventh Circuit affirmed, rather than reversed, the district court's judgment).

A. The Senate's Ratification of Montreal Protocol No. 4 Has Confirmed that — Both in the Past and in the Future — the Subjective Standard Applied By the Eleventh Circuit is the Correct One.

Before this case, the United States had been a party to the Warsaw Convention for 65 years, and yet no trial court had ever entered summary judgment in favor of plaintiffs on the issue of willful misconduct in any reported case. This case was a first, as the trial court admitted. *See* App., 91a.

Going forward, there is no reason to suspect that the issue of willful misconduct requires direction from this Court. Montreal Protocol No. 4 clarifies that "willful misconduct" under Article 25 of the Warsaw Convention has been and will be determined by what is clearly a ***subjective*** test. *See* S. Exec Rep. No. 105-20 at 15, 47, 52-53 (stating that the new definition did not modify the scope of "willful misconduct" in the United States). The question central to this case and this petition — whether the Convention's limitation on liability for damages can be lifted where an airline employee does not apprehend the danger created by his conduct — has been clearly answered in the negative by Montreal Protocol No. 4 and its legislative history. *See* Point IV, *infra*.

This clarification should remove any lingering uncertainty as to whether the "willful misconduct" standard should be judged by an objective or subjective test. In light of this recent clarification, there is no need for the Court to grant certiorari. Indeed, it would be premature for this Court to consider certiorari until the lower courts have had an opportunity to apply the instructive language of Montreal Protocol No. 4.

B. Recent IATA Agreements Have Rendered Article 25 of the Convention Irrelevant for Future Cases.

Not only has the subjective nature of "willful misconduct" under Article 25 been clarified by Montreal Protocol No. 4, its relevance in cases other than this one has been virtually extinguished by recent, private actions of the world's major international airlines. As petitioner herself concedes, "by 1998, . . . most of the world's major airlines had signed inter-carrier agreements prepared in 1995 by the International Air Transport Association ("IATA"), by which the airlines waived the Article 22 liability cap, ***rendering Article 25 irrelevant for future Warsaw Convention cases.***" Pet. at 4-5, note 5 (emphasis added); *see also IATA/Legal* (visited Dec. 16, 1999) *<http://www.iata.org/legal>* (containing summaries and text of agreements, as well as lists of carriers signatory to the agreements).

Under the IATA agreements, carriers are strictly liable up to 100,000 "special drawing rights," or SDRs, which is roughly equivalent to $137,000.[6] In addition, carriers are liable for damages in excess of 100,000 SDRs unless they can prove that they and their agents have taken "all necessary measures to avoid the damage or that it was impossible for them to take such measures." *See Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA)* (visited Dec. 16, 1999) *<http://www/iata.org/legal/agreement.htm>*; App., 13a, note 4. "Willful misconduct" is no longer relevant under these agreements.

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6. SDRs are a type of international "currency" created by the International Monetary Fund. On Thursday, December 16, 1999, 100,000 SDRs equaled approximately $137,000. *See Currency Values in Terms of Special Drawing Rights* (visited Dec. 16, 1999) *<http://www.imf.org>*.

To the same effect, and ultimately more significant, is the Montreal Convention, which was recently adopted and signed by representatives of 52 nations, including the United States. *See* Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, reprinted in Av. L. Rep. (CCH) ¶ 27,400, *et seq.* (1999) ("Montreal Convention"). The Montreal Convention incorporates, in substance, the same liability scheme as the IATA agreements: strict liability up to 100,000 SDRs and a rebuttable presumption of liability for damages beyond that amount. *See id*; *see also ICAO Update, May 1999* (visited Dec. 16, 1999) <*http://www.icao.org*>; George N. Tompkins, Jr., *The Montreal Convention of 1999*, N.Y. Law J., June 29, 1999, at 3. The Montreal Convention will enter into force as soon as it has been ratified by 30 states, a process the International Civil Aviation Organization ("ICAO"), which convened the conference where the Montreal Convention was adopted, believes could be achieved as early as the end of 2000. *See ICAO Update, May 1999* (visited Dec. 16, 1999) <*http://www.icao.org*>. As with the IATA agreements, willful misconduct will no longer be relevant under the Montreal Convention.

If the Warsaw Convention's limitation on liability for damages is no longer relevant after the IATA agreements and will no longer be relevant under the Montreal Convention, perforce the fashion in which that limitation may be lifted does not deserve the attention of this Court. Time has passed this issue by.

III.

THIS COURT SHOULD NOT GRANT CERTIORARI AT THIS STAGE IN THE PROCEEDINGS.

The Eleventh Circuit reversed the district court's grant of summary judgment in favor of petitioner and remanded the case for trial. Accordingly, petitioner seeks review of an interlocutory order, rather than a final judgment. This Court has long cautioned that "this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). The possibility that the further proceedings may moot or shed additional light on the question presented strongly counsels against granting review before final judgment. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

IV.

THE ELEVENTH CIRCUIT DID NOT MISREAD THE LEGISLATIVE HISTORY OR THE EXECUTIVE BRANCH'S INTERPRETATION OF MONTREAL PROTOCOL NO. 4.

This Court generally does not employ its certiorari jurisdiction to engage in error correction. Nonetheless, petitioner dedicates most of her petition to re-arguing the merits of her unsuccessful position on appeal. Not only are

petitioner's efforts irrelevant, they are also mistaken, for the Eleventh Circuit properly construed the legislative history and Executive Branch interpretation of the Montreal Protocol.

Petitioner claims the Eleventh Circuit's determination that Article 25, as amended by Montreal Protocol No. 4, incorporates a subjective standard for willful misconduct conflicts with the legislative history and the Executive Branch's interpretation of the amended language. To the contrary, statements of Executive Branch agencies included by the Senate in its report on Montreal Protocol No. 4 reflect just the opposite.

In the years after the Warsaw Convention was adopted, a split developed between the way United States courts interpreted willful misconduct under common law and the more lenient fashion in which foreign civil law jurisdictions defined the term. Montreal Protocol No. 4, and its predecessor, the Hague Protocol,[7] addressed that conflict and implemented the American common law standard for willful misconduct as the uniform definition to be applied in all foreign countries adopting these Protocols to the Warsaw Convention. The Protocols clarified that willful misconduct requires a finding that an airline employee acted with either: (a) ***intent*** to cause injury; or (b) ***knowledge*** that injury would

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7. The relevant language of Montreal Protocol No. 4 was originally drafted for the Hague Protocol in 1955. Although the United States never adopted the Hague Protocol, the Senate, in ratifying Montreal Protocol No. 4, adopted the definition of willful misconduct included in the Hague Protocol. *See* S. Exec. Rep. No. 105-20, at 8 ("Pursuant to Article XIX of Protocol No. 4, if the United States ratifies Protocol No. 4, it also will accede to the Hague Protocol of 1955.").

probably result from his or her conduct. *See* S. Exec. Rep. No. 105-20, at 15 (hereinafter "Senate Report"). Both of these standards require investigation of the actor's subjective state of mind.

The deliberations over the revised language in the Protocols confirmed the drafters' intent that willful misconduct under the Convention be measured by the subjective standard developed and endorsed by American courts, rather than by the less demanding standard followed in civil law countries. In response to a question from the Senate Committee on Foreign Relations, the State Department explained that:

> Because the concept of willful misconduct came to have different connotations in the civil and common law systems, the drafters of Hague replaced the legal standard with a description of the conduct itself, that a jury would be able to understand. This standard has been identified as the ***common law definition*** of "willful misconduct."

S. Exec. Rep. No. 105-20, at 15 (emphasis added).

According to the Senate Report, that common law definition of willful misconduct was memorialized in a jury charge in *Froman v. Pan-American Airways, Inc.* (N.Y. Sup. Ct., N.Y. County March 9, 1953), *aff'd*, 135 N.Y.S.2d 619 (N.Y. App. Div. 1954), *appeal denied*, 137 N.Y.S.2d 821 (N.Y. App. Div. 1955), *cert. denied*, 349 U.S. 947 (1955). *See* S. Exec. Rep. No. 105-20, at 47; *see also* Nathan Calkins, *Grand Canyon, Warsaw, and the Hague Protocol*, 23 J. Air L. & Comm. 253, 266 (1956) (noting that the Hague Protocol

adopted the *Froman* jury charge). That jury instruction explained that "willful misconduct" was to be measured against a subjective standard:

> "Willful" ordinarily means intentional; that the act that was done was what the person doing it meant to do. But the phrase "willful misconduct" means something more than that. It means that in addition to doing the act in question, that the actor must have ***intended*** the result that came about or must have launched on such a line of conduct with ***knowledge*** of what the consequences probably would be and have gone ahead recklessly despite his ***knowledge*** of those conditions.

See Froman, p. 452-53 (emphasis added). In further clarification that willful misconduct requires knowledge, not only of the action, but also of the danger that the action poses, the jury instruction included the following example:

> If a driver drives down a street and his attention is attracted to something on the sidewalk or if he is looking for a house and if instead of looking ahead of him he looks out the window of the car, that is negligence, but it is ***not*** willful misconduct, even though his act of looking out the car is intentional; he means to look out of the car. But he does not mean or does not have in mind that if he does look out of the car something unfortunate is likely to happen. So even though that is carelessness, and may be very gross carelessness, it is not willful misconduct.

> If, on the other hand, a driver takes out a car ***knowing*** that the brakes are so defective that he cannot stop and ***knowing*** that that is something that is ***likely to result*** in an accident but he nevertheless does it and an accident occurs, that is willful misconduct.

Id. at 453 (emphasis added).

The Senate Report also referred to *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122 (2d Cir. 1951), and *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), as correctly setting forth the standard for willful misconduct under the Montreal Protocol. *See* S. Exec. Rep. No. 105-20, at 53. In *Pekelis*, the court upheld the trial court's charge that defined willful misconduct as:

> the ***intentional*** performance of an act with ***knowledge*** that the performance of that act will probably result in injury or damage, or it may be the ***intentional*** performance of an act in such a manner as to imply reckless disregard for the probable consequences of the performance of the act [; or] . . . the intentional omission of some act, with knowledge that such omission will probably result in danger or injury. . . .

187 F.2d at 124 (emphasis added) (quoted in S. Exec. Rep. No. 105-20, at 53). *Pekelis*, therefore, required that the actor appreciate the consequences of his actions and nonetheless proceed in reckless disregard of those consequences. *See Berner*, 346 F.2d at 536-37 (interpreting *Pekelis* as requiring knowledge that harm would probably result).

Similarly, *Grey* defined willful misconduct as:

> a ***conscious intent*** to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a ***realization of the probability of injury*** from the conduct, and a disregard of the probable consequences of such conduct.

227 F.2d at 285 (emphasis added) (*citing Pekelis*, 187 F.2d 122) (quoted in S. Exec. Rep. No. 105-20, at 53). *Grey* thus also required a subjective awareness of the harm that could result from the actor's conduct.

The legislative history surrounding the relevant language in Montreal Protocol No. 4, therefore, demonstrates that amended Article 25 was intended to reflect the consensus of American courts as to what willful misconduct requires, *i.e.*, subjective knowledge. As a result, those advising the Senate on the ratification of the Protocol in the United States could state with confidence that the Protocol merely restated — and did not change — the standard for willful misconduct as applied by courts in this country. *See, e.g.*, S. Exec. Rep. No. 105-20, at 15 ("[T]he substitution of this language for 'willful misconduct' does not modify the scope of the standard. Instead, it is a clarifying response to the difficulties that arose from differing translations of the text in various languages."); *id.* at 53 ("[I]n light of the above-quoted definitions [from *Pekelis* and *Grey*], it is our view that the amendment to Article 25 will have no practical effect on the rights of claimants in cases under the Warsaw Convention.").

In deciding that those involved in the drafting of the amended language of Montreal Protocol No. 4 and its later ratification meant what they said, the Eleventh Circuit Court of Appeals misinterpreted nothing. Instead, the court merely joined the consensus that Montreal Protocol No. 4 was intended to cement.

V.

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Plaintiffs have had their day in court. The district court afforded them four days of hearings on their Motion for Summary Judgment and a 47-page opinion staking out an isolated and incorrect interpretation of the Warsaw Convention. The Court of Appeals could have easily disposed of this case on the simple rationale that — as the cases repeatedly recite — "willful misconduct" is assuredly an issue of state of mind requiring a factual inquiry, and hence the case was an inappropriate one for summary judgment. After all, no other court had ever been so bold or so far-reaching in its exercise of summary judgment powers. *See* App., 91a (district court acknowledging that it was the first to so hold).

Instead, the Eleventh Circuit gave painstaking attention to all of plaintiffs' arguments. The Court entertained oral arguments of unusual length (a total of approximately one and one-half hours) and requested supplemental briefing on the impact of Montreal Protocol No. 4. The Court produced a scholarly, thoroughly-researched 36-page examination of the history and application of the Warsaw Convention.

There have been no shortcuts and no miscarriage of justice here. There has been only a fair result that leaves no issue deserving the attention of this Court.

CONCLUSION

Based upon the foregoing, review by this Court is neither necessary nor appropriate. Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

GRIFFIN B. BELL
BYRON ATTRIDGE
CHILTON DAVIS VARNER
Counsel of Record
PAUL D. CLEMENT
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

RANDAL R. CRAFT, JR.
ALAN D. REITZFELD
HAIGHT GARDNER HOLLAND
& KNIGHT, A LAW OFFICE OF
HOLLAND & KNIGHT LLP
195 Broadway
New York, New York 10007
(212) 513-3200

Attorneys for Respondent